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## Unborn Communities

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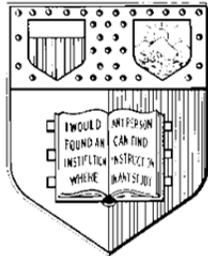
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### **Unborn Communities**

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## UNBORN COMMUNITIES

Gregory S. Alexander\*

Do property owners owe obligations to members of future generations? Although the question can be reframed in rights-terms so that it faces rights-oriented theories of property, it seems to pose a greater challenge to those theories of property that directly focus on the obligations that property owners owe to others rather than (or, better, along with the rights of owner). The challenge is compounded where such theories emphasize the relationships between individual property owners and the various communities to which they belong. Do those communities include members of future generations? This paper addresses these questions as they apply to a property theory that I have developed in recent work, a theory that we can call the human-flourishing theory of property.<sup>1</sup>

The conclusion drawn here is that property owners do indeed owe moral obligations to future generations. But the scope of those obligations is restricted, certainly more so than some theorists, such as Jeremy Waldron, have claimed.<sup>2</sup> Unlike Waldron, for whom such obligations are a matter of rights, I argue that the obligations that property owners owe to past generations are grounded on dependence. Specifically, I argue that if we expect fellow members of our communities in future generations to continue what I call the life-transcending projects that we began, then it is incumbent on us to provide that same background conditions that we enjoyed to those future generation community members to whom we transfer the responsibility of continuing or fulfilling our life-transcending projects. Moreover, as the distance between the living and the unborn increases, our obligations to future generational communities generally weaken. Our obligations to them are limited to the background conditions that enable them to continue the life-transcending projects transferred to them. These conclusions place me in an intermediate position between those who take a robust view of the obligations that the living owe to future generations<sup>3</sup> and those who think that the living owe no such obligations at all.<sup>4</sup>

### I. THE HUMAN-FLOURISHING THEORY OF PROPERTY: AN OVERVIEW

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\* A. Robert Noll Professor of Law, Cornell University. I am indebted to participants in the Eighth Annual International Human Rights Conference of the Academic Center of Law and Business, held in Tel Aviv, Israel, in January 2013, for comments on an earlier draft of this paper, and to the organizers for inviting me. I am especially indebted to my friend Hanoch Dagan for his usual trenchant criticisms and helpful comments. The numerous errors that doubtless remain are all mine.

<sup>1</sup> See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEOR. INQUIRIES IN L. 127 (2009).

<sup>2</sup> See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 115-17, 423, 425-27, 430-39, 444-45 (1988) (developing a general-rights theory of property with broadly distributive implications).

<sup>3</sup> See, e.g., *id.*; JOHN RAWLS, *THE LAW OF PEOPLES* §44 (Cambridge, MA, 1999).

<sup>4</sup> See, e.g., Richard A. Epstein, *Justice across the Generations*, in Peter Laslett and James S. Fishkin eds., *JUSTICE BETWEEN AGE GROUPS AND GENERATIONS* 84 (New Haven, CT, 1992) Richard de George, *The Environment, Rights, and Future Generations*, in Ernest Partridge, ed., *RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS* 157 (Buffalo, NY, 1981).

The fundamental normative premise of this paper is that the moral foundation of property is human flourishing. By human flourishing, I mean that a person has the opportunity to live a life as fulfilling as possible for him or her.<sup>5</sup>

There are two key characteristics of my conception of human flourishing. First, it is morally pluralistic; that is, it rejects the notion that there exists a single irreducible fundamental moral value to which all other moral values may be reduced. Rather, it conceives of human flourishing as including (but not limited to) — individual autonomy, personal security/privacy, personhood, self-determination, community, and equality. These values cannot be reduced to a single basic value because they are incommensurable; that is, there is no available metric by which one can commensurate goods such as equality and personhood. (It's like saying that Einstein's genius was "better than" Mother Theresa's compassion — the comparison makes no sense.) They are all aspect of human flourishing, and cannot be balanced one against the other.

The second defining characteristic of flourishing is that it is objective. This is why flourishing is a better translation of *eudaimonia* than happiness is. The problem with "happiness" is that it connotes something which is subjectively determined. It is for me, not for you, to pronounce on whether I am happy, or on whether my life, as a whole, has been a happy one. Contrast my being healthy or flourishing. Here we have no difficulty in recognizing that I might think I was healthy, either physically or psychologically, or think that I was flourishing and just be plain wrong. It is all too easy for me to be mistaken about whether my life is *eudaimon* (the adjective from *eudaimonia*) not simply because it is easy to deceive oneself, but because it is easy to have a mistaken conception of *eudaimonia*, or of what it is to live well as a human being, believing it to consist largely in physical pleasure or luxury for example.

My account of human flourishing stresses two necessary conditions. First, following Amartya Sen,<sup>6</sup> I argue that human beings must develop certain *capabilities* necessary for a well lived, and distinctly human life. Among these necessary capabilities are *health*, the ability to engage in *practical reasoning*, *freedom* to make deliberate choices, and the ability to get along with other people (*sociability*). The second necessary condition for human flourishing is a social context. Flourishing occurs only in society with, indeed, *dependent* upon, other human beings. Living within webs of social relationships is a necessary condition for humans to develop the distinctively human capacities that allow us to flourish.

These two characteristics of human flourishing, developing necessary capabilities and dependency on others, are deeply interconnected. We are not born as autonomous agents; we learn it. And we do not develop autonomy by ourselves or through our own devices; we develop autonomy through the help of others. We are, in short, inevitably dependent upon various

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<sup>5</sup> My use of the term "human flourishing is Aristotelian. Aristotle's term, of course, was *eudaimonia*, which is commonly translated as "happiness." Human flourishing is a better translation of *eudaimonia*, however, for reasons explained further in the paper.

<sup>6</sup> See, e.g., AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (New Delhi, 1999); AMARTYA SEN, *FREEDOM AS DEVELOPMENT* (New York, 1999).

communities, both chosen and unchosen, not only for our physical survival, but also for our ability to function as free and rational agents.

Communities, including but not limited to the state, are the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities.<sup>7</sup> Even (or more properly, precisely) as free, rational persons, we never cease to operate within and depend upon the matrices of the many communities in which we find ourselves in association. Each of our identities is inextricably connected in some sense to others with whom we are connected as members of one or typically more communities. Our identities are literally constituted by the communities of which we are members. Asked who we are, we inevitably talk about the communities where we were born and raised, our nation, our family, where we attended school, our friends, our religious communities and clubs. Indeed, individuals and communities interpenetrate one another so completely that they can never be fully separated.<sup>8</sup>

The communities in which we find ourselves play crucial roles in the formation of our preferences, the extent of our expectations, and the scope of our aspirations. The homeless person, accustomed to receiving little more than abuse or neglect, may come to expect little more out of life.<sup>9</sup> Similarly, although membership in certain communities can obviously be based upon contract or voluntary agreement, the very possibility of these voluntarily associative relationships depends upon our prior and continuing (and typically involuntary) participation in or exposure to communal institutions. These institutions impart to us the information and capacities that give us the tools needed to permit us to understand and engage in voluntary choosing at all.<sup>10</sup>

Precisely because capabilities are essential to flourishing in a distinctively human way, development of one's capabilities is an objective human good, something that we ought (insofar as we accept these particular capabilities as intrinsically valuable) to promote as a good in and of itself. As a matter of human dignity, every person is equally entitled to flourish. This being so, every person must be equally entitled to those things essential for human flourishing, i.e., the capabilities that are the foundation of flourishing and the material resources required to nurture those capabilities. In the absence of these capabilities and supporting resources, recognition of the entitlement to flourish is simply an empty gesture. But not every society will be equally conducive to human flourishing. The cultivation of the capabilities necessary for flourishing depends upon social matrices, and the condition of those matrices varies among societies, sometimes quite widely. A society that fosters those capabilities that are necessary for human flourishing is morally better than one that is either indifferent or (even worse) hostile to their

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<sup>7</sup> The conception of community which underlays my approach to the social-obligation norm owes much to the following works: ROBERT BELLAH ET AL., *HABITS OF THE HEART*, 2d ed. (New York, 1996); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (Oxford 1999); ALASTAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* (Chicago 1999); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE*, 2d ed. (Cambridge 1998); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (Cambridge, Ma, 1989).

<sup>8</sup> For an elaboration of this idea, see Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 21–28 (1989).

<sup>9</sup> See SEN, *COMMODITIES AND CAPABILITIES*, *supra* at 21 (“A person who is ill-fed, undernourished, unsheltered and ill can still be high up in the scale of happiness or desire-fulfillment if he or she has learned to have ‘realistic’ desires and to take pleasure in small mercies.”).

<sup>10</sup> See TAYLOR, *SOURCES OF THE SELF*, *supra* at 196–98; Alexander, *The Social-Obligation Norm in American Property Law*, *supra passim*.

manifestation.

Human flourishing requires not only virtues, but also resources. Each of us desires resources to enable development of the capabilities that are essential for human beings. Being social animals, moreover, humans want those resources not only for themselves but also for others so that they develop the capabilities for flourishing as well.<sup>11</sup> Hence, human flourishing requires distributive justice, the ultimate objective of which is to give people what they need in order to develop the capabilities necessary for living the well-lived life (though not necessarily what they want).<sup>12</sup>

If human capacities such as health, the ability to engage in practical reasoning, and to make reasoned decisions about how to live our lives are components of the well-lived life, then surely we are all obligated to support and nurture the social structures without which those human capabilities cannot be developed.<sup>13</sup> Consequently, from the standpoint of the capabilities necessary for human flourishing, how we participate in political and social communities cannot just be an expression of our preexisting autonomy; our participation cannot be solely a volitional act we commit for instrumental reasons such as preference satisfaction. Our participation in community is also an objectively grounded obligation rooted in our recognition of the value of the capabilities that are necessary for the well-lived life.

Acknowledgment of our human dependence upon others and upon the social matrices that nurture the capacities that enable us to flourish creates for us a moral obligation to support these matrices. The major claim here, in short, is that our (and others') dependence creates, for us (and for them), an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible.

## II. THE MEANINGS OF COMMUNITY

The term "community" can be used to refer to a concept,<sup>14</sup> a regulative ideal,<sup>15</sup> or a social institution or practice, but all too frequently scholars do not make clear in which sense they are

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<sup>11</sup> See JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* (New York, 2006), p. 8.

<sup>12</sup> As Gordley points out, the Aristotelian concept of human flourishing also rests on commutative justice, the object of which is to enable each person to obtain what she needs for the development of the essential capabilities without unfairly inhibiting others' abilities to do the same. See *id.*

<sup>13</sup> *Id.* at 197.

<sup>14</sup> Referring to community as a concept, Andrew Mason has usefully distinguished between "ordinary" community and "moralized" community. See ANDREW MASON, *COMMUNITY, SOLIDARITY, AND BELONGING: LEVELS OF BELONGING AND THEIR NORMATIVE SIGNIFICANCE* (Cambridge 2000), pp. 21–27. By "ordinary" community, Mason means a group who act or cooperate together in pursuit of shared goals or at least who possess common interests. *Id.*, 21. A "moralized" community has two additional conditions: (1) solidarity, or mutual concern, i.e., its members must give each other's interests some degree of non-instrumental weight, and (2) no systematic exploitation among members. *Id.*, 27.

<sup>15</sup> As a regulative or normative ideal, theorists like Michael Sandel have used the term as an alternative to the political and moral vision of "atomist" individualists, whose central doctrine is, as Charles Taylor explains, "a principle ascribing rights to men as binding unconditionally . . . [b]ut . . . do[es] not accept as similarly unconditional a principle of belonging or obligation." CHARLES TAYLOR, *PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES*, vol. 2 (Cambridge 1985), 188. Arguing against the primacy of rights, communitarians like Taylor have propounded what he calls a "social thesis," which holds that the very affirmative of our right creates for

using the term. In the context of property theory, community is more commonly used to refer to social institutions and practices.<sup>16</sup> As a social institution, community exhibits a remarkable diversity of forms, covering a wide spectrum of practices.<sup>17</sup> Even if we confine the term “communities” to territorial communities, it remains maddeningly ambiguous. Its use ranges from small face-to-face groups in which personal relationships are close and characterized by a high degree of mutuality and identification to the so-called “global community.” Part of the difficulty stems from the famous distinction drawn by Ferdinand Tönnies between *Gemeinschaft* and *Gesellschaft*,<sup>18</sup> the former referring to small-scale, pre-industrial groups whose social relations are intimate, while the latter refers to the contractual and impersonal relationships typical of industrial societies. Although most social scientists today regard that distinction as unhelpful, it continues to influence some discussions of community by a tendency to dichotomize conceptions of community as either hopelessly weak or “tightly knit,” with the latter often romanticized as the ideal toward which communities ought to aspire.

For present purposes, what matters is to understand that individual volition plays only a limited role in the context of communities, as social institutions. Membership in communities may be non-volitional as well as volitional. Moreover, communities play crucial roles in the formation of our preferences, the extent of our expectations, and the scope of our aspirations. Indeed, the very possibility of communities being based on private, individual choice depends upon our prior and continuing (and frequently involuntary) participation in or exposure to communal institutions that impart to us the information, resources, and capacities necessary to understand and engage in voluntary choice to begin with.

Non-volitional communities are non-strategic in character. This means that their members do not join them or remain in them for individual strategic advantages. Indeed, members of some non-volitional communities sometimes find their membership disadvantageous in some personal, but very real sense. For example, family members may experience membership in their families threatening to their personal identities in some way and try to deny membership from the family or escape from it.

The non-strategic and non-contractual character of many communities means that social relations within them will transcend demands for immediate or short-term reciprocity. It further means that members of such communities, which include but are not limited to political communities, have obligations to fellow members of their communities. These obligations result from membership itself. What members give to fellow community members are not in the nature of market exchanges, where a calculated return of greater value is expected. There may well be an expectation of reciprocity, but, as Hanoch Dagan notes,<sup>19</sup> the expectation may well operate over an extended period of time, perhaps even extending over multiple life-times. Moreover, the

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us an obligation to belong to and sustain the right kind of society, i.e., the kind of society that nurtures people’s capabilities to develop as free and autonomous moral agents.

<sup>16</sup> See, e.g., Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Community*, THEORETICAL INQUIRIES IN LAW (2009)

<sup>17</sup> See *ibid.*

<sup>18</sup> FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY*, Jose Harris ed. (Cambridge 2001).

<sup>19</sup> See Hanoch Dagan, *Taking and Distributive Justice*, 85 VA. L. REV. 741 (1999); Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134 (2000).

form that such long-term reciprocity takes means that compensation may be very different in kind from what was given. Indeed, it may come from a member of the community other than the one to whom it was given, and, in some ways, its “value” relative to the original contribution is less important than that it is received at all.<sup>20</sup>

### III. ARE THERE INTERGENERATIONAL COMMUNITIES?

The idea that there are communities that cross generational boundaries has been widely contested. Without reviewing all of the objections and questions that theorists have raised regarding this concept, we must at least consider some of these doubts. For example, given that individuals do not regularly interact with members of future generations, how are intergenerational communities even possible? Second, how can such communities be said to exist when some individuals do not identify with any generation other than their own? Third, if communities are constitutive of individual identities insofar as its members share notions of the good or at least participate in open debates about shared goods, how are transgenerational constitutive communities possible where members of future generations do not directly participate in such debates?

The first problem is familiar in the literature on intergenerational justice. The notion of intergenerational communities seems implausible given the fact that members of the present generation do not interact with future generations.<sup>21</sup> In the absence of such interaction, there is no reciprocity between present and future generations.<sup>22</sup> There must be, one scholar argues, “an exchange of ideas and conceptions of purposes that must be available to persons before they can be considered to stand as joint participants in a common project.”<sup>23</sup>

This objection trades on a narrow conception of interaction. It supposes that social interaction must be face-to-face, direct, or synchronic. But interactions among groups often are diachronic. The transmission of cultural memories, shared political histories and traditions,<sup>24</sup> for example, are diachronic, yet are forms of group interaction. In the process of such transmissions, past generations speak, as it were, to the present and future generations. Those generations, in turn, speak back to the past by interpreting these histories and traditions from their own point of view. What results is a hermeneutic conversation that is certainly an “exchange of ideas and conceptions of purposes.” Indeed, this hermeneutic intergenerational conversation is sometimes more robust than that among generational contemporaries.

Related to the question of interaction is another objection that is sometimes raised. Because present and future people are not positioned so as to be able to reciprocate with each other, they cannot develop a sense of identity with each other, a feeling of being on the same

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<sup>20</sup> See Alexander, *The Social-Obligation Norm in American Property Law*, *supra* at 770-771.

<sup>21</sup> See, e.g., Ernest Partridge, *Future Generations*, in *A COMPANION TO ENVIRONMENTAL ETHICS*, Dale Jamieson ed. (Malden, MA, 2001).

<sup>22</sup> See Norman S. Care, *Future Generations, Public Policy and the Motivation Problem*, 4 *ENVIRONMENTAL ETHICS* 195 (1982).

<sup>23</sup> *Id.* at 208.

<sup>24</sup> In the U.S., for example, a clear example is the history and tradition of the U.S. Constitution, a cultural memory that has been the subject of extraordinarily lively debates.

side.<sup>25</sup> This objection fails to take account of the multiple ways in which people can and do identify with each other. It is not fruitful to ask whether members of one group identify in the abstract with members of another group. The more helpful question is whether there is some specific level or respect in which members of the different groups identify with each other. For example, as a practicing Roman Catholic, I identify with Catholics around the world on the various issues that concern the Church despite the fact that I am not in a position to reciprocate with many of them. Identification for purposes of community existence does not require complete or 100 percent identity of interests or views. Such a requirement would disqualify many groups that otherwise plainly are communities, including families. What is required is that members of the two groups experience a sense of common membership with respect to some value that is important to them both.

A third objection concerns shared purposes. Presumably, members of communities hold shared purposes or norms. Such sharing is indispensable to the existence of communities because of their constitutive nature. According to this constitutive conception of communities,<sup>26</sup> a “community [is] constitutive of the shared self-understandings of the participants and embodied in their institutional arrangements.”<sup>27</sup> That is, what binds members of the community together is not sentiment but identity.<sup>28</sup> Community members share understandings of whom and what they are, and these understandings are sufficiently fundamental that they constitute part of the members’ self-identities.

Avner de-Shalit refers to the experience of sharing that is necessary for constitutive communities by the term “moral similarity.”<sup>29</sup> He distinguishes that term from cultural homogeneity which may characterize groups that may lack shared ideas or purposes.<sup>30</sup> Nor does moral similarity require unanimity. Communities experiences debate about the ideas and norms they share, sometimes quite robustly. Old ideas may be reexamined; new one proposed and either adopted or rejected. As the community’s normative constitution shifts, some members may become disaffected, losing their moral similarity, and drop out. The shift may attract new member in turn. The point is that debate is very much a part of, indeed even necessary for, the experience of moral similarity.

If debate is necessary for the moral similarity that characterizes communities, how is such a debate possible between members of present and future generations? Here de-Shalit introduces another concept that is useful — cultural interaction. De-Shalit points out that every community has its own history of cultural interaction, which includes political, social, and cultural experiences that they share as well as shared traditions, symbols, practices, and codes.<sup>31</sup> Cultural interaction is not confined within the same generation, of course, for children interact in various ways with their parents and grandparents about the meanings and even legitimacy of their

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<sup>25</sup> See Care, *Future Generations, Public Policy and the Motivation Problem*, *supra*, at 208-09.

<sup>26</sup> See MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (Cambridge, 1982); AVNER DE-SHALIT, *WHY POSTERITY MATTERS: ENVIRONMENTAL POLICIES AND FUTURE GENERATIONS* (London, 1995).

<sup>27</sup> SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE*, *supra*, at 173.

<sup>28</sup> See DE-SHALIT, *WHY POSTERITY MATTERS*, *supra*, at 33.

<sup>29</sup> *Id.* at 25-31 and *passim*.

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.* at 23.

traditions and beliefs. These interactions are face-to-face, but others are not. For example, religious communities whose shared traditions include historical texts read, interpret, reinterpret, and debate those texts over many generations, sometimes centuries, in an ongoing debate about the meaning and legitimacy of various textual meanings. These debates are between present and past generations as well as within single generations. This example is what Alastair MacIntyre has in mind when he writes

[L]iving tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations.<sup>32</sup>

The contested meaning and even legitimacy of the religious group's core texts are the topics of an ongoing argument as to the religion's very identity. In this respect, as MacIntyre points out, "Traditions . . . embody continuities of conflict."<sup>33</sup>

These continuities are forward-looking as well as backward-looking. Cultural practices commonly speak to the future, even the distant future. When originators of core religious texts (or glosses upon those texts) write, they address not only their contemporaries but followers (including future converts) who will listen to their texts and reply, as it were, throughout the generations ahead. The conversation is not face-to-face, but it is very real nonetheless. It is as real as when an American citizen writes a letter to her President, knowing that there will be no reply. The letter writer does not think she is speaking to herself, for there is some possibility that her letter will influence the President in some well, however indirectly or slightly.

Future community members to whom the group's cultural values, traditions, and practices are addressed receive the message. Their cultural and normative starting point is what they inherited from their forebears. But they are not merely passive receptors. They answer back by reviewing, critiquing, and sometimes revising the cultural traditions and normative material that they inherited. Revision is sometimes necessary because of changes in the community's circumstances, economic, social, technological, or other types of changes.<sup>34</sup> Eventually, the degree of moral similarity will diminish to the point that it is no longer meaningful to consider the intergenerational community as still existing. De-Shalit explains:

When it comes about that the values of the members of the community change drastically, many members will find themselves in a state of growing alienation from the community of their ancestors. This will continue until the question arises as to whether they still regard it as the same transgenerational community, a community which defines the "self" of its members. A time will come when it becomes questionable whether future generations will still speak of the same transgenerational community.<sup>35</sup>

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<sup>32</sup> ALASTAIR MACINTYRE, AFTER VIRTUE 222 (Notre Dame, IN, 1981).

<sup>33</sup> *Ibid.*

<sup>34</sup> See DE-SHALIT, WHY POSTERITY MATTERS, *supra*, at 46-49.

<sup>35</sup> *Id.* at 47.

Intergenerational constitutive communities, then, are both dynamic and contingent. They change, and their duration is limited, dependent as they are upon external factors that affect their members' identification with them and their shared normative orientation.

#### IV. CAN OBLIGATIONS EXIST WITHIN INTERGENERATIONAL COMMUNITIES?

The human flourishing theory grounds obligation on dependence. As we have seen, it locates the source of property owners' obligations to their communities on the fact that all human beings are dependent throughout their lives on others to provide them in various ways with the means necessary to enable the development of certain indispensable capabilities. Even if one agrees, following the previous analysis, that communities are not confined to presently living persons, one may argue that, on the theory's own premises, property owners cannot owe obligations to members of future generations because the living are not dependent upon unborn persons. This is a powerful objection, and it requires careful consideration.

##### A. *Looking Back: Obligations to Past Generations*

Before looking forward, we must first look back. That is, we need first to discuss obligations that the present generation owes to past generations and the basis for such obligations. Much has already been written on this topic,<sup>36</sup> but what matters for my purposes is the role of dependence in establishing obligations between members of different generations. The basis for skepticism that such an obligation exists is the very fact that members of past generations are dead. Because they are gone, the skeptic argues, nothing that we do or do not do today can possibly make their lives go any better or worse. The response to this objection that I shall make will pave the way for the case for obligations that we owe to future generations.

The skeptic's argument that living persons can do nothing to affect the lives of those who are dead ultimately rests on the assumption that obligations must be based on avoidance of harm.<sup>37</sup> Whether the dead can be harmed is a matter of considerable debate in the philosophical literature,<sup>38</sup> but we need not resolve that debate to conclude that the present generation does owe obligations to the past. There is another basis for such obligations, an alternative to the harm principle. That basis is what we can call *life-transcending projects*. People have interests in having life-transcending projects carried through and realized after their deaths, sometimes many years after their deaths, but obviously they cannot do so themselves. They are dependent upon the living to honor the interest that the dead have in seeing their life-transcending projects continued and realized beyond the death of their creators.

Life-transcending projects are those projects the personal value or importance of which transcend creators or originators of the projects personally and so to transcend their lifetimes. Such projects vary widely. They range from personal projects, such as businesses that people

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<sup>36</sup> See, e.g., THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* (Cambridge, MA, 1998); George Pitcher, *The Misfortunes of the Dead*, 21 *AMERICAN PHILOSOPHICAL QUARTERLY* 183 (1984).

<sup>37</sup> See JANNA THOMPSON, *INTERGENERATIONAL JUSTICE: RIGHTS AND RESPONSIBILITIES IN AN INTERGENERATIONAL POLITY* 56 (New York, 2009).

<sup>38</sup> See, e.g., Joan C. Callahan, *On Harming the Dead*, 97 *ETHICS* 341 (1987); Pitcher, *The Misfortunes of the Dead*, *supra*; Joel Feinberg, *The Rights of Animals and Unborn Generations*, in W.T. Blackstone ed., *PHILOSOPHY AND ENVIRONMENTAL CRISIS* 4 (Athens, GA, 1974).

have created, to public-minded projects, such as charitable foundations. Nor are life-transcending projects limited to material affairs of these sorts. They may be as abstract as ideas or theories that a person has developed and to which she has devoted a great deal of effort and time. There are many obvious examples of life-transcending projects, including important private institutions including universities (e.g., Stanford, Cornell, The University of Chicago), museums (e.g., the Barnes Museum, the Guggenheim Museum); foundations (e.g., the Ford Foundation, the Carnegie Foundation); private hospitals, and so on.

Other examples are less obvious. For example, wealthy individuals commonly create charitable trusts in their wills, and these charitable trusts typically involve life-transcending projects. Charitable trust donors usually impose restrictions on what the trustees can do with the trust funds, and these restrictions represent attempts to assure that future trustees fulfill the donor's life-transcending project. Sometimes these restrictions become impossible or impracticable to implement, and the law must modify the terms of the trust instrument so that the trust can operate on terms as close as possible to the donor's original intent.<sup>39</sup> At other times, however, the donor's restrictions are so extreme or become irreconcilable with evolving public policy that courts are no longer willing to carry out the donor's project as originally intended. (A racially discriminatory trust is an example.<sup>40</sup>) When that occurs, the court must decide whether the donor's project was so intimately tied to the offensive feature that he would not want to go forward without it. If that is the case, then the court must refuse to carry out the trust. But if the court concludes that in its judgment the offensive feature was not indispensable to the donor's project, then the court will revise the terms of the project to remove the offending feature and go forward with it.

### B. *The Dead Hand Problem*

Restrictions that now-deceased creators of life-transcending projects sometimes impose on later generation beneficiaries of these projects may pose difficult questions concerning the obligations of the living generation when asked to implement the terms of the project. For example, when creators of life-transcending projects transfer their projects to later generation beneficiaries in trusts, they sometimes do so through family trusts that extend the duration of trust for very long periods of time, over many generations of future beneficiaries who are given only limited property interests in the projects. The creator's objective is to control the project for many generations after his death. This creates a problem known to common-law lawyers as the "dead-hand" problem.<sup>41</sup> Anglo-American law places limits on these dead-hand trusts, albeit indirectly, through various rules, including the infamous Rule Against Perpetuities.<sup>42</sup> Other problematic creator-imposed restrictions in trusts include prohibitions on the sale of an asset that the creator originally transferred into the trust and which later declines in value, thereby threatening the interests of the beneficiaries. Commonly, the assets in question are life-transcending projects, such as a business that the creator personally started and developed.

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<sup>39</sup> This is known as the *cy pres* doctrine (*cy pres* is short for *cy pres comme possible*, a phrase taken from old Law French, meaning "as nearly as possible"). It is well-established in the common law. *See, e.g.*, UNIFORM TRUST CODE §413; RESTATEMENT (THIRD) OF TRUSTS §67.

<sup>40</sup> *See, e.g.*,

<sup>41</sup> *See*

<sup>42</sup>

A good example of this problem is the case of Joseph Pulitzer's will.<sup>43</sup> Pulitzer, after whom the top American annual prizes for journalism is named,<sup>44</sup> left a will that gave to his trustees the large majority of shares of stock in a publishing company that he owned and created, the Press Publishing Company. This firm published several newspapers, including the now-defunct *New York World*, to which Pulitzer was particularly devoted. The trust was for the benefit of his sons. Pulitzer's will expressly withheld from the trustees the power to sell the Press Publishing Company stock "under any circumstances whatever . . ."<sup>45</sup> The will went on to give Pulitzer's reasons, reflecting the fact that the Press Publishing Company was his life-transcending project:

I particularly enjoin upon my sons and my descendants the duty of preserving, perfecting and perpetuating "The World" newspaper (to the maintenance and upbringing of which I have sacrificed my health and strength) in the same spirit which I have striven to create and conduct it as a public institution, from motives higher than mere gain, it having been my desire that it should be at all times conducted in a spirit of independence and with a view to inculcating high standards and public spirit among the people and their official representatives, and it is my earnest wish that said newspaper shall hereafter be conducted upon the same principles.<sup>46</sup>

Some years after Pulitzer's death, readership of the *World* newspaper steadily eroded, causing the value of the Press Publishing Company stock to substantially decline. The trustees sought judicial approval to sell the stock on the ground that the unanticipated changes of circumstances threatened to defeat the purpose of the trust, which, they argued, was the benefit of Pulitzer's sons. The court agreed, holding that it had the inherent power to respond to emergency circumstances that threatened total destruction of the trust asset. Regarding the will's language that the stock not be sold under any circumstances, the court stated, "A man of [Pulitzer's] sagacity and business ability could not have intended that from mere vanity, the publication of newspapers, with which his name and efforts had been associated, should be persisted in until the entire trust asset was destroyed or wrecked by bankruptcy or dissolution."<sup>47</sup>

John Langbein has posed the challenging question, "Suppose . . . that the settlor in *Pulitzer* had foreseen and recited in the trust instrument the danger that the newspaper might become unprofitable, and he directed the trustees to continue operating it anyhow." Langbein points out, "Such a restriction would not have been enforceable."<sup>48</sup> He goes on to explain, "Attempting to prevent the court from modifying the trust in response to such materially worsened circumstances would offend the anti-dead-hand principle embodied in the rule that the trust must be for the benefit of the beneficiaries."<sup>49</sup> The "benefit-the-beneficiaries" rule to which Langbein refers expresses the public policy that once a person has placed property in trust for the benefit of third parties, their benefit must override any personal motive that the creator may have

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<sup>43</sup> Matter of Pulitzer, 249 N.Y.S. 87 (Sur. Ct. 1931), aff'd mem., 260 N.Y.S. 975 (App. Div. 1932).

<sup>44</sup> See

<sup>45</sup> 249 N.Y.S. at 92.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Id.* at 94.

<sup>48</sup> John H. Langbein, *Mandatory Rule in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1118 (2004) (footnote omitted).

<sup>49</sup> *Id.* at 1118-19 (footnote omitted).

had regarding the continuing use of the property that is fundamentally incompatible with the beneficiaries' interests.<sup>50</sup>

The *New York World* newspaper was a life-transcending project of Joseph Pulitzer, as his restriction so vividly manifests. The case is a good illustration of both the fact that there must be limits on the obligations, especially legal obligations, that the living owe to the dead to implement life-transcending projects of the dead, however fundamental they may have been, and some of the reasons why such limits must exist.

The dead hand problem creates a risk of undermining the communal character of intergenerational relations. Past generations may not only impose restrictions of the sort I have just described, but they may refuse to transfer important assets to future generations of family members altogether. For example, Joseph Pulitzer may have chosen to leave his newspaper businesses to a business associate rather than to his sons. This undermines the dependency between generations and inhibits future generations from working within the framework necessary for communal relations between the generations. The role of future generations is, after all, to participate in the life-transcending projects of past generations, enhance them, and enable them to be carried forward into the future. If members of past generations exercise their control over those projects by refusing to transmit them within the family, broadly defined, then this role will be frustrated.

There is no obvious or easy way to avoid this risk. It is a consequence of a legal system that prefers the freedom of past owners over that of the interests of the living. American law imposes no restrictions upon the ability of testators to leave their property at death to whomever they wish, disinheriting any members of their family except the surviving spouse.<sup>51</sup> We must work within whatever limits the existing legal system creates. Nevertheless, reasons of self-interest suggest that this risk is not great. Creators of life-transcending projects usually trust their children and grandchildren more than non-family members to carry through with their projects. After all, in most cases the creator's children have been with the project since its inception and are more aware than most people of its importance to their parent. The parent may even have groomed the children or grandchildren to take over care and management of the project at the appropriate time in the future. This is by no means an invariable scenario. Parents sometimes do disinherit their children, but the incidence of this is sufficiently small that the risk of this aspect of the dead hand problem is not great.

### *C. Are Intended Transferees Obligated to Accept Life-Transcending Projects?*

Do the transferees of life-transcending projects owe obligations to past-generation creators to accept the projects and carry through with them, or are they free to refuse to accept the projects? Normally, of course, the law of gifts provides that intended donees are free to

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<sup>50</sup> See UNIFORM TRUST CODE §404, 105(b)(3); RESTATEMENT (THIRD) OF TRUSTS §27(2).

<sup>51</sup> American states have statutes, called elective share statutes, that protect a surviving spouse from disinheritance. The statutes vary in their details, but typically give the surviving spouse a non-barrable share of 1/3 of the decedent's estate. See THOMAS P. GALLANIS, FAMILY PROPERTY LAW: WILLS, TRUSTS, AND FUTURE INTERESTS 349-353 (New York, 2011).

refuse gifts — acceptance is a requirement for completion of a donative transfer.<sup>52</sup> But is there a moral obligation here? There may, after all, be different considerations when asking whether a legal or moral obligation exists to the past generation.

There really are two separate questions here: first, whether the intended transferee is free to refuse the transfer entirely or instead must accept the life-transcending project; second, whether, if the transferee accepts the project, she is free to possess, use, or enjoy that project in whatever way she sees fit, regardless of the creator's original purpose or intent. With respect to the first question, autonomy considerations loom large, but they do so as to both sides. Inevitably, someone's autonomy interest must be sacrificed — that is precisely the rub of the dead hand dilemma.

I suggested earlier that human dependence upon others and upon the various means that nurture the capacities that enable us to flourish creates for us a moral obligation to support these nurturing means. Does this general principle apply in this situation such that intended recipients are morally obligated to accept transfers of life-transcending projects? There are two possible arguments. One is that living persons owe obligation to past generations, growing out of the former's dependence, as a result of the past generations' endowments of various resources that support the capabilities necessary for human flourishing. On this view, there is no necessary connection between nurturing of the necessary capabilities and the life-transcending project in question. It is the general endowment of various resources upon which living persons are dependent that furnishes the basis for the obligation. This connection seems too strained, too remote, to justify imposition of an obligation on living persons to accept an unwanted project, whatever it is. Although autonomy is not a paramount value in the human flourishing theory, it is nevertheless relevant to that theory. Under the circumstance posed, autonomy strongly counsel against forcing any transfer between private actors. Regardless of the intended recipient's reasons, she should be free to reject a gift of any item, including a life-transcending project.

A weaker version of the argument holds that an obligation exists where the life-transcending project itself is a means that nurtures necessary human capabilities. In such a case what was lacking in the previous discussion — a strong fit between the project itself and the dependency that is the predicate for obligations — is present, providing the foundation for a moral obligation to accept the transfer of the life-transcending project. Of course, not every life-transcending project serves as a means for nurture the necessary capabilities. Some such projects will not be of that sort. The obligation should be limited just to those instances in which the life-transcending project in question can plausibly be taken to be a means that nurtures, in some significant, or at least non-trivial way, the capabilities necessary for human flourishing. For many such life-transcending projects intended transferees will have self-interested reasons to accept the project voluntarily, but some people nevertheless have their own reasons to prefer rejecting the project. In such cases autonomy considerations weigh against forcing an unwanted gift upon the intended transferee.

Different considerations come into play where the living transferee has voluntarily accepted the life-transcending project but wishes to possess, use, or enjoy the project free of any further obligation to the past creator. Certainly if the life-transcending project itself is a means that nurtures necessary human capabilities, the same reasoning suggested above applies even

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<sup>52</sup> See RICHARD HYLAND, *GIFTS: A STUDY IN COMPARATIVE LAW* 484, 493 (New York, 2009).

more strongly, and the recipient should be obligated to follow through with the creator's wishes. Even if there is no dependence upon the life-transcending project, however, obligations to make reasonable efforts to realize the creator's wishes attach. What efforts are reasonable will vary depending upon the context, but one factor that will carry considerable weight in the reasonableness calculus is time. The further removed in time the recipient is from the creator, the weaker the obligation becomes. This is not only because it becomes more difficult to determine exactly what the creator's wishes were but also because circumstances are likely to change as more time passes, creating the need to weaken the recipient's obligations to the dead. American trust law, even while requiring that the original donor's intent be respected, recognizes the need to build flexibility into the trust arrangement to accommodate future changes in circumstances. For charitable trusts, the *cy-pres* ("as near as possible") doctrine permits courts to revise the terms of trusts where changed circumstances have made it impossible or impracticable to fulfill the donor's original plans.<sup>53</sup> For private trusts, the deviation doctrine permits courts to modify the terms of a trust where unanticipated changes of circumstances put the trust's well-being in jeopardy.<sup>54</sup> Similar considerations apply with respect to moral obligations owed to past generations.

#### *D. Looking Forward: Obligations to Future Generations*

Let us now reverse direction and look forward. Having concluded that members of the living generation owe duties, moral and at times legal, to honor and carry out certain life-transcending projects of the dead, does it necessarily follow that the same holds true of the relationship between those who are now living and the unborn? After all, the relationship between present and future generations can be seen as just the mirror image of that between the present and the past: living people are the future dead, and unborns are the future living.

There is, of course, a dependency relationship between present and future generations. But that relationship, seemingly, is asymmetrical — our children and grandchildren are dependent upon us, but not the other way around. Future generations depend upon us for many things, not the least of which is their existence. But existence, though hardly inconsequential, is hardly the sole matter that is the source of their dependence upon us. Clean environment, basic infrastructure, a workable public system of government — all this and more are matters that future generations depend for their flourishing on their ancestors to inherit as their starting point. Of course, future generations may create these conditions themselves in the absence of such an inheritance, as some societies have indeed done, but in that case they create their own flourishing rather than depend upon their ancestors to pass on to them the basic conditions of social flourishing.

If our children and their descendants depend upon us for certain basic conditions necessary for their flourishing, seemingly we are not dependent on them for our flourishing. The unborn cannot provide us with any material goods, such as a clean environment or infrastructure, comparable to what we transmit to them.

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<sup>53</sup> See UNIFORM TRUST CODE §413.

<sup>54</sup> See UNIFORM TRUST CODE §412.

Although the dependency relationship between present and future generations appears to asymmetrical, in fact it is not. Living people depend upon future generations to carry through with the life-transcending projects that living persons begin during their lifetimes. The dependency of the living upon future generations may take multiple forms, ranging from recognition of the project as something worth pursuing to execution and ongoing management of the project. Just as the dead cannot entirely realize their life-transcending projects themselves but must depend on the living to fulfill the dead's interests, so it is also between the living and their successors. The very nature of life-transcending projects makes living persons dependent upon future generations to respect the project and continue its existence.

Living persons sometimes attempt to reduce the discretion of future generations to recognize and implement life-transcending projects through the same techniques discussed previously, notable legal arrangements that impose duties on the future donees to comply with specified restrictions. Arrangements like trusts are especially common among wealthier creators, whose life-transcending projects often are an important part of their estate portfolio.

Wealthy persons are not the only ones who have life-transcending projects the fulfillment of which require the help of future generations. Owners of small businesses and family farms usually hope that the enterprises to which they have devoted the better portion of their lives will continue to thrive after their deaths, and they depend on future generations to carry out their hopes and dreams. Inventors hope that their creations will continue to be used many years after their deaths. Authors hope that their works will continue to attract readers for decades, even centuries to come. Scholars hope that future scholars will use their work, and so on.

Even those whose lives have seemingly not been devoted to creative enterprises have their own life-transcending projects. The protection and care of family heirlooms, even though with modest or slight market value, is often a matter of great concern to ordinary people, including people of limited wealth. They pass on to their children and grandchildren objects that they themselves received from their ancestors as tokens of memory, family continuity, and love, and they depend on their children and grandchildren to care for these emotionally-weighted objects and to pass them on when their turn comes. Not only heirlooms but other objects, seemingly minor, often are items of life-transcending projects. Hobbies, for example, are very important to many people, so important that they lead to life-transcending projects. Consider collections, such as stamps, coins, figurines, and the like. Collectors commonly are passionate about their collections, and they pass them on to others at their death in the hope that future owners will recognize the project's significance and survive rather than simply being tossed away as if it were nothing more than yesterday's newspapers. Creative hobbies such as painting, knitting, potting, and so on, also come to take on life-transcending status for many people. The results of these activities, what this type of hobbyists produces, are equally if not more weighted with self-expression and personal identity than collections. It would be surprising if even the most modestly talented amateur artist or woodworker is indifferent to destiny of her or his creation. Even as a matter of pure self-interest, creators care about the future of their creations. They do not as a matter of transcending their own self-interest or personal values, but because their self-interest is inextricably tied to the fate to what they have created. Creators of all sorts do not value their creations solely for the enjoyment that they give the creators during their lifetimes. Creations have deeper value than that. In a very real sense, such creations, even those

limited in achievement or talent, represent a form of immortality for their creators. What such projects transcend, then, is not self-interest but time. But the immortality that the creators of such projects seek for their creations requires the cooperation of future generations. The creators cannot realize time-transcendent value of their projects by themselves; they are dependent on others — future generations — to do so.

## V. THE SUBSTANTIVE CONTENT OF OBLIGATIONS TO FUTURE AND PAST GENERATIONAL COMMUNITIES

Assuming, at least provisionally, that intergenerational communities exist (i.e., that such a concept is meaningful) and that members of such communities owe each other duties, just what are those duties, and, equally important, what are the limits of those duties? These duties are moral duties, although conceivably they might have legal implications. My main concern here is with the moral duties, although I shall have some comments regarding possible legal aspects.

More important for my purposes than the distinction between moral and legal duties is the distinction between the obligations that living generational members owe to their immediate future counterparts — i.e., those who are, say, two generations removed from them, on the one hand, and on the other, the obligations that they owe to more remote future counterparts. As we will see, the two perspectives raise different considerations.

### A. *The Obligations Owed to (Relatively) Immediate Future Generational Communities*

There are two possible bases for obligations owed to future generational communities, contract, including implied understandings, and dependency. Although it is possible that in particular cases they will overlap, it is important to treat them separately, for they the content of moral obligations that each may justify is likely to differ.

#### 1. Dependency-Based Obligations

The starting point for thinking about what moral obligations we owe to future generation communities is the very factor that is the foundation for the general claim that past, present, and future generational communities may owe each other obligations — dependency. What we minimally owe, as a moral matter, to both deceased and unborn members of the various communities that nurture the capabilities necessary for our flourishing derives from our and their dependency on each other. Specifically, the content of our and their obligations must relate to their and our life-transcending projects and the fact that the fulfillment of those projects are dependent upon the cooperation of others who come after us.

Those life-transcending projects and our dependency of future generations for the realization of such projects provide the reference point for our moral obligations to future generation communities. But that reference point is beguilingly robust. It means, or might be taken to mean, that our obligations include providing the background infrastructure that is necessary for any such project's continuation or realization. This background infrastructure would include, for example, a clean (or reasonably so) environment — air, water, and so on — that future generational communities will inhabit and in which they will work. Lacking such an

environment, they simply will be unable to carry through with any life-transcending projects, including their own. As Joel Feinberg remarked, “[S]urely we owe it to future generations to pass on a world that is not a used up garbage heap.”<sup>55</sup> The requisite background infrastructure will also include well-functioning transportation and communication networks. It will further include a health-care system whose quality equals or exceeds that of the present generation.

All of these background conditions — a reasonably clean environment, well-functioning transportation and communication networks, a minimally acceptable (both in terms of quality and distribution of health-care services) health-care system — are circumstances that those in present-day generation communities take for granted. If, then, those present-day community members expect, or at least hope, that their fellow community members in future generations will continue the life-transcending projects that the living members began, it is incumbent on them to provide the same background conditions that they enjoyed to those future community members to whom they transfer the responsibility of continuing or fulfilling their life-transcending projects. That obligation should apply to the extent that such background conditions are reasonably necessary or facilitative for the implementation of the relevant projects. This is a basis upon which we can explain Brian Barry’s equal-opportunity maxim: “The overall range of opportunities open to successor generations should not be narrowed.”<sup>56</sup>

The obligation to provide the same background conditions that living community members enjoy to those future community members to whom they transfer the responsibility of continuing or fulfilling their life-transcending projects is foundational and general. It serves as a broad basis upon which the pursuit of life-transcending projects can be conducted, a necessary but not always sufficient for such projects to continue beyond the lives of their creators.

Beyond this minimal obligation,<sup>57</sup> what further obligations living community members owe to future generation members will depend on the project that living members pass on to their future co-members. Additional obligations must be reasonably connected to the particular life-transcending projects in the sense that the obligations are reasonably necessary for the project’s

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<sup>55</sup> Joel Feinberg, *The Rights of Animals and Unborn Generations*, in Blackstone, PHILOSOPHY AND ENVIRONMENTAL CRISIS, *supra* at p. 598.

<sup>56</sup> Brian Barry, *Circumstances of Justice and Future Generations*, in R.I. Sikora and Brian Barry, eds., OBLIGATIONS TO FUTURE GENERATIONS (Philadelphia, 1978), p. 242.

<sup>57</sup> Regarding the legal dimension of this minimal general obligation, the question is should members of future generation communities have positive legal rights to such background conditions. If they do have such rights, against whom would those rights be enforceable, at what time(s) and by whom? The question of the timing of enforcement comes up because if the rights are enforcement only when the future generation members come into existence, then it is possible that the duty-bearers may no longer be available. The timing issue relates to the question of the identity of the duty-bearer, or at least the identity of the party against whom the right is enforceable. Specifically, are such positive rights enforceable against the state, acting as the agent or representative of community members who are the real duty-holder? Further questions exist. These positive rights, like all positive rights, pose problems concerning the exact scope of the right: May the rights-holders demand that the duty-holder(s) take any and all steps necessary to provide a clean environment, etc., or is it sufficient if the duty-holder puts into place a reasonable policy or program designed to achieve a clean environment, etc., given the financial and other constraints under which the duty-holder is acting? It is worth noting that the latter is the approach that countries like the Republic of South Africa have taken in interpreting the positive socio-economic rights provisions of their constitutions. See *Grootboom*.

continued existence or fulfillment. We may think of these specific obligations as endowments that support the life-transcending projects.

What might such endowments include? It depends, of course. Suppose, for example, that the life-transcending project that a current generation community member wishes her/his future community members to continue and advance to the extent possible is a business that the current member created. S/he legally transfers the business to her/his descendants at death, enjoining them to continue and grow the business. Should the business creator be morally obligated to transfer to the recipients of the business with any additional resources by way of an endowment to carry out that project? Of course, it is possible that there has been some agreement or understanding between the transferor and the recipients, as we will see, and in that case the agreement should normally control the parties' obligations.

But suppose there is no such understanding. Does the transferor owe the transferees of her/his business an obligation to provide any sort of endowment to support that business? This is not an easy question to answer, especially given the transferor's explicit injunction to the transferees to continue and advance the business to the extent possible. Initially, we have to suppose that the transferees accept the transfer, for donees are free, at least legally, to reject attempted gratuitous transfers, both lifetime and at death.<sup>58</sup> Assuming that the transferees accept the bequest and assuming further that the testator's injunction is merely precatory and creates no legal obligation, it may nevertheless create a moral obligation on the transferees, who, after all, accepted the business knowing of the testator's injunction to them and its likely importance to her/him. If such a moral obligation exists, a strong argument can be made that the testator should provide the transferees with some sort of additional endowment to the extent that additional resources are necessary to enable the transferees to fulfill their moral obligation to the testator. If additional resources are needed to allow the transferee to carry out the testator's injunction and the testator provides no further support, the transferees must deplete their own resources to do so. Of course, they could simply reject the bequest, but would present them with a Hobson's Choice: either accept the bequest with the consequence that they must deplete their own resources to fulfill their moral obligation to the testator, or reject the bequest entirely (which has the undesirable side effect of frustrating the testator's life-transcending interest). Fairness seems to suggest reciprocity of moral obligations here. The moral obligation on the transferees to fulfill, to the extent reasonably possible, the testator's injunction should they choose to accept the bequest should be matched by a moral obligation on the testator to provide such resources as are reasonably necessary to allow the transferees to fulfill their obligation to the transferee, should they choose to accept the bequest. This approach maximizes the likelihood that the testator's wishes, particularly the continuation of her/his life-transcending project, will be carried out and at the same time achieves fairness between the testator and the transferees.

## 2. Contract-Based Obligations

I have indicated that the moral obligations we owe to future generation communities derive from the dependent nature of the relationship between them. But the obligation might alternatively be grounded in contract. Where an agreement, explicit or implicit, existed between

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<sup>58</sup> See JESSE DUKEMINIER, ROBERT SITKOFF, and JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* (New York, 2009), p. 152.

the transferor of the life-transcending project and the recipients, the presumption should be that the agreement, assuming that it can be satisfactorily proved, creates an obligation, both moral and legal, in the recipients. This is simply a matter of basic contract principles. The real question is whether there ought to be any limits on the scope of that moral obligation. Plainly, there are some limits, both as a matter of law and morality, to freedom of contract. Terms, conditions, or restrictions that creator-donors place on transfers that violate public policy do not and should not create obligations, moral or legal, on beneficiaries of such transfers. Transfers subject to racially-restrictive conditions, to pick an obvious example, impose no enforceable obligations on beneficiaries even where the beneficiaries had previously agreed to such terms. The autonomy interests of the donor and the beneficiaries should not trump the larger stakes that society has in assuring that no group of its citizen is subordinated, dominated, or rendered unable to fully participate in the society's ongoing affairs, private as well as public.

Beyond terms or conditions of that sort, the question becomes more difficult to evaluate. Suppose, for example, that a testator bequeaths her business to her children with the understanding that the children continue to operate the business in exactly the same way that the testator had; i.e., for precisely the same business functions, with no expansion or other change in scope of business, no diversification of type of business, place of doing business, etc. Suppose further that some years later, the business's future is in jeopardy because the market for the firm's product had all but disappeared. The firm's current owners, the beneficiaries of the bequest of the firm's creator, want to save the business by diversifying its product line, but doing would clearly contradict the terms of the bequest. Would diversifying the firm's product line to save the family business breach an obligation, legal or moral, that the current owners owe to the past owner (all of whom are members of the same generational community)? From a legal perspective, it is unclear whether such an obligation exists. Normally, the law of donative transfers gives maximum effect to the transferor's wishes, but this only the baseline. There is an exception for public policy, of course, just as there is a public policy exception for the enforceability of agreements. For example, restraints that testator's impose on a beneficiary's personal conduct may be unenforceable on public policy grounds. Here, the restriction is on business conduct rather than personal conduct. Different policy considerations are involved where the restriction is on business conduct rather than on personal affairs such as the beneficiary's right to marry, especially here where an agreement between the transferor and the beneficiaries apparently exists. No personal rights of the beneficiaries are at stake, only the well-being of the business firm. Given the law's reluctance to interfere with freedom of disposition, it is quite possible, indeed likely, that the answer to the legal question is that a legal obligation on the beneficiaries to comply with the transferor's conditions exists, even at the risk of the firm dissolving into bankruptcy in the future.

As a moral matter, there is little reason to reach a different conclusion. Although somewhat different considerations come to bear when we move from the legal to the moral sphere, the matter does not change fundamentally. The principles of freedom of disposition and freedom of contract have a moral as well dimension, and there are no overriding moral considerations that weigh in favor of relieving the beneficiaries of an obligation that they voluntarily assumed, even at the expense of the firm's future. Perhaps they regret doing so now (as in all likelihood they do), but regret alone surely is not adequate moral grounds for relieving someone of a moral obligation that they voluntarily assumed.

### B. *The Obligations Owed to More Remote Future Generational Communities*

Thus far, the future generational communities that I have considered have all been immediate descendant generations — the generations of children and grandchildren of creators of life-transcending projects. The more difficult aspect of the general problem of future generational communities involves more remote generations. Such generations pose more difficult questions because project creators cannot expect to share a common life with such persons, at least not in any literal sense.<sup>59</sup> The problem is not simply that project creators will not know persons who are more than three generations removed from them (or vice versa) but, more fundamentally, that little connects living persons to such remote future generations other than the most basic sorts of commonalities, notably genetic ties and perhaps family names. Even those ties become more attenuated with each generation removed.

Given that increasing attenuation, one may question whether such remote future generations are members of the same generational communities as the living at all. I previously indicated that community members share understandings of whom and what they are, and one might suppose that the attenuation of ties between present and remotely future generation means that such shared understandings will be lacking. At the same time, I indicated, echoing Avner de-Shalit,<sup>60</sup> that part of what constitutes communities is cultural interaction<sup>61</sup> and that cultural interaction includes shared traditions, which may involve “historically extended, socially embodied argument[s].”<sup>62</sup> As Alastair MacIntyre observed, such arguments and such traditions may extend through many generations.<sup>63</sup>

Assuming that the creator’s generational community includes remote future generations, the question then becomes whether the same obligations that are owed to relatively near generations also are owed to remote future generations. Some years ago, Martin Golding argued that our obligations to future generations ought to be confined to our “immediate posterity”<sup>64</sup> because we cannot know what is good for them. We do not know what the condition of their lives will be or even whether they share with us the same conception of the good life for human beings.<sup>65</sup> We would be well-advised, then, Golding, simply not to plan for remote future generations.

Conceding Golding’s points regarding the lack of information about the specific condition of the lives of remote future generation members and their conception of the good life, it does not follow that the living owe them no moral obligations whatsoever. The same problem may exist for some living persons who are members of cultures that are far removed from and quite alien to ours, but that fact does not warrant the conclusion that we owe no moral

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<sup>59</sup> See Martin P. Golding, *Obligation to Future Generations*, in Ernest Partridge ed., *RESPONSIBILITIES TO FUTURE GENERATIONS* 61, 61-62 (Buffalo, NY, 1981).

<sup>60</sup> See DE-SHALIT, *WHY POSTERITY MATTERS*, *supra*.

<sup>61</sup> See page 4 *supra*.

<sup>62</sup> MACINTYRE, *AFTER VIRTUE*, *supra*, p. 222.

<sup>63</sup> *Ibid.*

<sup>64</sup> See Golding, *Obligation to Future Generations*, *supra*, p. 70.

<sup>65</sup> *Ibid.*

obligations to them. We owe such persons moral obligations by virtue of their humanity. Regardless of the specific conditions of their existence, members of remote future generations share with us certain basic features that are inherent in the human condition — the abilities to love and to enjoy; vulnerability to pain, suffering, and ultimately, death; self-consciousness; and so on.<sup>66</sup> Given these fundamental commonalities, the moral norms of equality and human dignity suggest that, although differences may exist between the moral obligations that we owe members of immediate future generational communities and their remote counterparts, we owe members of our remote future generational communities at least minimal moral obligations.

Nevertheless, our lack of information about remote future generational communities and their attenuated relationship to the living do have a bearing upon the content of our obligations to them. Golding's point that we cannot plan for such persons seems correct as far as it goes. The obligations that living creators of life-transcending projects owe to remote future generational community members must be of a more basic sort. The obligations should be aimed at constituting a framework within which members of remote future generational communities who wish to continue life-transcending projects transmitted to them may do so, a background that enables such individuals to pursue these projects, if they so choose. This background condition consists of certain of the fundamental capabilities discussed in Part I, among these the capabilities of health, personal security, and freedom.

A more concrete statement this background must take into account the possible effects, allocative but especially distributive, of norms that would affirmatively seek to assure that resources are available to remote future generations. This is, of course, a familiar problem in discussions on intergenerational justice.<sup>67</sup> The problem is complex, for it involves two uncertain variables, first, increasing scarcity of resources over the future, and second, the contingency of future generational communities. This is not the proper occasion for anything like a full analysis of the distributive problem, but a few comments on these two variables will indicate why caution is appropriate in mapping out a specific account of the background condition.

With regard to future scarcity, the dilemma posed by uncertainty is this: Whether economic growth can be sustained in a finite natural world is one of the most persistent questions in economic literature. The unprecedented rate of consumption of natural resources and the concomitant effects have given rise to acute concern with sustainability, a term that has come to be closely associated with intergenerational justice in the relevant literatures. Because the growth in the rate of consumption has been exponential, the fear is that relevant consumption rates at some future point will swamp production rates, leading to potentially catastrophic results.

But this scenario is far from certain. We cannot categorically exclude the possibility that human creativity will ameliorate increased scarcity. After all, in the past, humans have proved to be quite adept at finding solutions to the problem of scarce natural resources. Repeatedly, they have developed new technologies that economize on scarce natural resources or that allow the

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<sup>66</sup> See Gregory Kavka, *The Futurity Problem*, in Partridge, RESPONSIBILITIES TO FUTURE GENERATIONS, *supra*, at 109, 112-113.

<sup>67</sup> See, e.g., *ibid*; Daniel Callahan, *What Obligations Do We Have to Future Generations?*, in Partridge, RESPONSIBILITIES TO FUTURE GENERATIONS, *supra*, at 73.

use of resources that were previously uneconomical. There is no obvious reason to think that this pattern will not continue, allowing us not merely to avoid passing on to remote future generations a greatly degraded and depleted environment but to transmit a set of conditions that is at least as good as what we currently enjoy (thereby satisfying a future generational counterpart to the Lockean proviso<sup>68</sup>).

Which scenario will transpire? We cannot know, of course, and that is precisely the problem. For if we are to develop anything like a concrete account of the background condition that we owe to members of our remote future generational communities, we must have some idea of what the probable state of resources available to such future persons is. In the absence of that basic information, we simply cannot specify our obligation in any sort detail.

The second variable of uncertainty is the contingency of future generations. This contingency is not simply a matter of *when* but of *whether* — members of our future generational communities may not exist at all. Their existence depends, to a considerable extent, upon decisions that living members make. How does this existential uncertainty affect the moral obligations that living community members owe to potential members in the future? Gregory Kavka poses a useful analogy.<sup>69</sup> Imagine, he suggests, a poor couple that has some children and is contemplating have more. The question is whether they should treat the prospective children are being on a par with their living children with respect to the consumption of their resources, i.e., by conserving resources for unborn children. Kavka's answer is that they should not if doing so would cause the living children to suffer serious deprivation.<sup>70</sup> This answer seems to me to be the right one. The living have moral obligations to living members of their communities, and those obligations must be met first. This is not to say that the living owe no obligations to conserve resources for future generational members, including remote future generations. The point is one of priority — under conditions of scarcity, priority in the distribution of resources must be given to existing resource consumers. Moreover, the more remotely in the future the generational members are, the weaker the moral obligation that the living owe to them.

### *C. The Contingency of Our Obligations to Unborn Communities*

Grounding our obligations to future generational communities on a specific dependency between generations, i.e., the dependency of the living generation upon their future generational counterparts to carry on life-transcending projects, seemingly makes those obligations contingent in a way that other bases for such obligations do not.<sup>71</sup> The apparent vulnerability of the obligations to future generations on this account results from an implied advance deal between the generational communities: The living will provide the future counterparts with a clean environment, a well-functioning infrastructure, a reasonable efficient economy, and minimally acceptable health-care system in exchange for future generations' reasonable efforts to carry out the life-transcending projects of their forebears. This may be a troubling conclusion to some who think that our obligations to transfer such a material foundation to future generation should be unconditional and unconstrained. From one perspective, the dependency theory looks like a hold-

<sup>68</sup> See JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Peter Laslett ed. (Cambridge 1988).

<sup>69</sup> KAVKA, THE FUTURITY PROBLEM, *supra*, p. 114.

<sup>70</sup> *Ibid.*

<sup>71</sup> I am grateful to Hanoch Dagan for raising this point.

up. More fundamentally, the theory seemingly encroaches upon future generations' autonomy interest in creating their own lives and the conditions of those lives.

This concern, although understandable, does not, I think, fundamentally undermine the dependency theory. One reason is the diversity and protean character of life-transcending projects. That character minimizes the cost to future generations of carrying on with such projects. Indeed, in many, perhaps most cases the enterprise of carrying on with such projects is a benefit rather than a cost, and it is in the self-interest of future generation community members to do so. The upshot is that the aggregate of both life-transcending projects and future generation community members will likely yield precisely the background material conditions and structures that proponents of non-contingent obligations to future generations desire.

Of course, this scenario is not certain, and contingency still exists. But contingency is an inescapable aspect of the human condition. No one can guarantee future conditions of the world. There are too many variables over which we have little or no control. Weather conditions may change catastrophically for non-man-made reasons (as best as science can presently tell), globalization of financial markets may produce long-term economic depressions over which any single nation has little control, global changes in population and immigration (legal and illegal) — all of these possible future scenarios may seriously affect the ability of any nation or even group of nations to transmit to future generations stable and decent material conditions and structures. All that the living can commit themselves to do for future generations is to make reasonable efforts, under whatever circumstances happen to prevail at the given time, to transmit decent minimal material conditions. Admittedly, that commitment is limited, and it leaves future generations with risks. But that is the most the living can promise the unborn.

## CONCLUSION

The living do owe moral obligations to unborn members of their communities, but those obligations are limited. They are limited in multiple ways, including the basis, or source, or the obligations, and the distance between the presently living members and unborn members. The basis of the obligations is rooted in the idea of what I have called life-transcending projects: the desire that living persons have in seeing that certain projects or interests of theirs be carried on after their deaths. This basis of the obligation helps define the range of persons, resources, and precise nature of the obligations. Moreover, the obligations that the living owe to future generational communities generally weaken as the distance between the living and the unborn increases. In an environment of uncertainty and scarce resources, our first and greatest moral obligation regarding the distribution of resources is to those members of our communities who are living with us and who continue to nurture the capabilities necessary for us to flourish. The second priority should be given to the future generational communities who come immediately after us, for the relevant ties between those generations usually will be relatively strong. The further out generational line stretches, the weaker our obligations become.