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Toward a Better Understanding of Intergenerational Justice

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I. INTRODUCTION

INTERGENERATIONAL justice is a term that refers to society's moral and legal duties to future generations. Intergenerational issues often arise as part of broader discussions of topics such as world population, nuclear war, and environmental degradation.[1] Increasingly, however, the problem of intergenerational justice is being addressed on its own merits. This emerging interest has spawned a number of books, essays, and law review articles in the past decade.[2] A review of this literature reveals a surprising amount of confusion and disagreement. Most authors begin with the assumption that people share intuitive feelings of concern and responsibility for future generations.[3] The authors then typically attempt to translate this concern into a coherent intellectual framework which is presented as the best way to approach the problem.[4] Despite many nu-

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1. *E.g.*, R. FALK, THIS ENDANGERED PLANET (1972) (population); J. SCHELL, THE FATE OF THE EARTH (1982) (nuclear war); Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 47-50 (1985) (environmental degradation).

2. *See, e.g.*, ENERGY AND THE FUTURE (D. MacLean & P. Brown eds. 1983) [hereinafter ENERGY]; OBLIGATIONS TO FUTURE GENERATIONS (R. Sikova & B. Barry eds. 1978) [hereinafter OBLIGATIONS]; RESPONSIBILITIES TO FUTURE GENERATIONS (E. Partridge ed. 1981) [hereinafter RESPONSIBILITIES]; Gardner, *Discrimination Against Future Generations: The Possibility of Constitutional Limitation*, 9 ENVTL. L. 29 (1978); O'Toole & Walton, *Intergenerational Equity as it Relates to Conservation and Coal Extraction Standards*, 22 NAT. RESOURCES J. 53 (1982); Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495 (1984).

3. One author refers to "the nearly universal recognition and acceptance among peoples of an obligation to protect the natural and cultural heritage for future generations." Weiss, *supra* note 2, at 500. *See also* Derr, *The Obligation to the Future*, in RESPONSIBILITIES, *supra* note 2, at 37 ("Ecologically-minded persons all *assume* this obligation [to future generations] to exist . . . . Of course they are right.") (emphasis in original); Feinberg, *The Rights of Animals and Unborn Generations*, in RESPONSIBILITIES, *supra* note 2, at 139 ("I shall assume furthermore that it is psychologically possible for us to care about our remote descendants, that many of us in fact do care, and indeed that we ought to care.").

4. Christopher Stone calls this phenomenon "moral monism":

> The conventional approach to ethics is to develop a single coherent body of principles, e.g., utilitarianism or Kantianism, and to demonstrate how it applies to all moral dilem-

ances, the approaches to date tend on the whole to fall into two general categories—rights theory and cost-benefit analysis. This Comment suggests that both approaches are grounded in assumptions about human experience that are fundamentally at odds with the assertion that people are responsible, caring beings, capable of making commitments to protect the well-being of future generations.

Section II of this Comment addresses the intergenerational rights approach. It attempts to show the deeply individualistic aspects of rights theory and demonstrate how the individualistic conception of rights clashes with the moral and ethical insights which first gave impetus to the theories. Section III examines the competing cost-benefit approach to intergenerational justice. This approach reveals several internal inconsistencies, and, like the rights approach, reinforces assumptions of individualism and competitive self-interest. Section IV outlines an alternative approach to the subject. By shifting the focus of analysis from the individual to the group, this approach attempts to escape some of the contradictions and conceptual traps that have frustrated earlier efforts.

II. THE PARADOX OF INTERGENERATIONAL RIGHTS

A. *Intergenerational Rights in Theory*

John Rawls was among the first to extensively analyze the problem of intergenerational justice.[5] Approaching the subject from the perspective of social contract theory, Rawls places all generations in a hypothetical "original position" which corresponds roughly to the "state of nature" in Enlightenment political theory.[6] In this original contracting position, all parties are situated behind a "veil of ignorance": no one knows their place in time, social status, wealth, or intelligence.[7] The parties then voluntarily choose the basic distribution of benefits and burdens that will apply across time. Because the parties are basically rational self-interested beings, they each try to secure the agreement on the best possible terms for themselves.[8] But the veil of ignorance makes the choice of unequal distribution unacceptable—no one wants to find himself in a poor generation. So the parties choose a distribution that leaves no single

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mas more satisfactorily than its rivals. This conventional view of the ethicist's mission, which I call Moral Monism, strikes me as dubious.

Stone, *supra* note 1, at 9.

5. J. RAWLS, A THEORY OF JUSTICE §§ 44-45 (1971).
6. *See id.* at 118-95.
7. *Id.* at 136-41.
8. *Id.* at 142-50.

generation in a position less favorable than that of any other generation.[9]

Although Rawls was deeply concerned with the subject of intergenerational justice in itself, his larger mission was to set forth an improved Kantian theory of justice as an alternative to classical utilitarianism.[10] With this as his goal, Rawls rejects the teleological conception of justice and asserts instead the priority of individual rights over an encompassing theory of the good.[11] Behind the veil of ignorance, the parties are deprived of any controlling conception of the common good.[12] They are thus forced to choose the governing principles of their future society based on a conception of individual moral right which exists independent of, and prior to, any broad conception of a good society.[13] Yet implicit in the arrangements agreed upon by the original contractors is a depiction of a good society which begins to take on the characteristics of a transcendent intergenerational community. The communal implications of *A Theory of Justice* come closest to the surface when Rawls discusses the "Idea of Social Union."[14] In this section, Rawls writes:

> [I]t is through social union founded upon the needs and potentialities of its members that each person can participate in the total sum of the realized natural assets of the others. We are led to the notion of *the community of humankind* the members of which . . . recognize the good of each as an element in the complete activity the whole scheme of which is consented to and gives pleasure to all. This community may also be imagined to extend over time, and therefore in the history of society the joint contributions of successive generations can be similarly conceived. . . .[T]he realizations of the powers of human individuals living at any one time takes the cooperation of many generations (or even societies) over a long period of time.
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> . . .Nor are there limits of the time and space, for those widely separated by history and circumstance can nevertheless cooperate in realizing their common nature.
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> . . .It follows that the collective activity of justice is the preeminent form of human flourishing. . . .[T]he public realization of justice is a value of community.[15]

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9. *Id.* at 284-93.

10. *Id.* at viii ("[T]his theory seems to offer an alternative systematic account of justice that is superior, or so I argue, to the dominant utilitarianism of the tradition. The theory that results is highly Kantian in nature.").

11. For an excellent discussion of Rawls's deontological focus, see M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 18-24 (1982).

12. *See* J. RAWLS, *supra* note 5, at 136-42.

13. *See* M. SANDEL, *supra* note 11, at 24-28.

14. J. RAWLS, *supra* note 5, at 520-29.

15. *Id.* at 523-29 (emphasis added).

This communal imagery gives much of the emotive force to Rawls's argument. In general, however, the imagery remains in the background. *A Theory of Justice* relies instead on an individualistic conception of human nature.[16] As Rawls makes clear, the values of association and community can only be accounted for "by a conception of justice that in its theoretical basis is individualistic."[17] The parties in the original position are isolated units separated from any grounding in social experience.[18] Although an individual may express communitarian sentiments, these sentiments are essentially individualized preferences unrelated to actual community with others.[19] Thus the Rawlsian community seems to be little more than an agglomeration of strangers.[20] The intergenerationally fair distribution that results from the original contract occurs only because each party acts "to achieve his own greatest good, to advance his rational ends as far as possible."[21] As one critic points out, this vision of the individualized self fails to account for the rich diversity of our social and moral experience, and, ultimately, is "less liberated than disempowered."[22]

The individualistic conception of human nature posited by Rawls is shared by a number of other theorists who view intergenerational justice as a matter of rights.[23] A right, to these theorists, is limited by the individual rightholder's capacity to possess it. The problem is that members of future generations—being merely possible—cannot be identifiable rightsholders in the usual sense. This strikes at the core of the rights model of intergenerational justice. If rights require identifiable individuals, then future generations cannot be said to have rights. As one author

16. The individualistic nature of the Rawlsian self is emphasized in M. SANDEL, *supra* note 11, at 59-65, 179-83.

17. J. RAWLS, *supra* note 5, at 264.

18. The parties in the original position are "essentially atomized monads with an interest in attaining their own private stock of goods, but who demonstrate no interest in promoting the welfare of others or in building a society of true participation, equality, or shared values." Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW 18, n.* (D. Kairys ed. 1982).

19. J. RAWLS, *supra* note 5, at 192. *See* M. SANDEL, *supra* note 11, at 60-65.

20. M. SANDEL, *supra* note 11, at 179.

21. J. RAWLS, *supra* note 5, at 23.

22. M. SANDEL, *supra* note 11, at 178.

23. The authors who analyze intergenerational justice in terms of rights theory include De George, *The Environment, Rights, and Future Generations*, in ETHICS AND PROBLEMS OF THE 21ST CENTURY 93 (K. Goodpaster & K. Sayre 1979); Feinberg, *supra* note 3; Kirsch, *Solidarity Between Generations: Intergenerational Distributional Problems in Environmental and Resource Policy*, in DISTRIBUTIONAL CONFLICTS IN ENVIRONMENTAL-RESOURCE POLICY 381 (A. Schnaiberg, N. Watts & K. Zimmerman eds. 1986)[hereinafter DISTRIBUTIONAL CONFLICTS]; Pletcher, *The Rights of Future Generations*, in RESPONSIBILITIES, *supra* note 2, at 167; Thompson, *Are We Obligated to Future Others?*, in RESPONSIBILITIES, *supra* note 2, at 195.

writes, "[f]uture generations do not now exist. They cannot now, therefore, be the present bearer or subject of anything, including rights."[24]

The conceptual puzzles presented by the absence of identifiable persons in future generations are taken to the extreme by the British philosopher Derek Parfit.[25] Parfit imagines how a future society might react to a choice made by the present generation to follow a dangerous energy policy which ultimately leads to catastrophe:

> *The Risky Policy*: Suppose that, as a community, we have a choice between two energy policies. Both would be completely safe for at least two centuries, but one would have certain risks for the future. If we choose the Risky Policy, the standard of living would be somewhat higher over the next two centuries. . . .
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> . . .This effect implies another. It is not true that, whatever policy we choose, the same particular people will exist two centuries later. Given the effects of two such policies on the details of our lives, it would increasingly over time be true that different people married different people. More simply, even in the same marriages, the children would increasingly be conceived at different times. (Thus the British Miners' Strike of 1974, which caused television to close down an hour early, thereby affected the timing of thousands of conceptions.) As we have seen, children conceived at different times would in fact be different children . . . .
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> In my imagined case, we choose the Risky Policy. As a result, two centuries later, thousands of people are killed and injured. But if we had chosen the alternative Safe Policy, these particular people would never have existed. Different people would have existed in their place. Is our choice of the Risky Policy worse for anyone?[26]

Parfit's identity paradox exemplifies the logical traps of thinking about rights and injuries solely in individualized terms. A dangerous energy policy can cause the deaths of thousands. However, as Parfit points out, the particular persons killed would never have been born if society had chosen to follow a different energy policy. Since the dangerous policy leads to a higher standard of living over the short run, it indirectly causes different marriages, different conception decisions, and hence different children being born. From this viewpoint, the present generation can never take actions that are "unjust" to future generations, because every

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24. De George, *supra* note 23, at 95; *see also* Kirsch, *supra* note 23, at 389 ("Individuals that can be identified in the future, but that are not identifiable in the present, cannot have individually assignable rights in the present . . . . ").

25. Parfit, *Energy Policy and the Further Future: The Identity Problem*, in ENERGY *supra* note 2, at 166.

26. *Id.* at 166-68.

action determines the identity of the individuals actually conceived and born.

The identity paradox leads to the troubling conclusion that society owes no moral obligations to future generations. Indeed, even the most dangerous policy benefits future individuals by indirectly causing their births. Many authors, including Parfit himself, resist the moral implications of the identity paradox.[27] This is important, because it seems to reflect an intuitive sense of concern for the future. Because this sense of intergenerational responsibility is intuitive, some theorists refuse to take it seriously. As one author concludes, "[t]he idea [of intuitive concern for future generations] is tempting as is almost always a solution that sacrifices the rigor of reason to the charms of sentiment. . . .[W]e should not succumb to this temptation . . . ."[28] Other authors reject their intuitive concern but admit to feeling some guilt in doing so.[29] The fact is that most people do care to some degree about the impact of society's present acts on future generations. But because rights analysis is so deeply individualistic, this desire meets with frustration and disappointment. The frustration is particularly acute in theories of intergenerational justice cast in rights-oriented language. A similar frustration is also evident in American laws and legal doctrines which approach intergenerational issues within the rights model.

B. *Intergenerational Rights in American Law*

A number of American laws reveal an explicit concern for future generations. The earliest example is the United States Constitution which "secure[s] the Blessings of Liberty to ourselves and our Posterity . . . ."[30] As the American historian Henry Steele Commager once noted, "[w]hat was uppermost in the minds of the founding fathers all the time [was a] sense of fiduciary obligation to posterity. Washington never stopped talking about it. Jefferson spoke of our descendants and thousands and thousands of generations. Tom Paine spoke about it, they all did."[31] The

27. *Id.* at 177-78; *see also* MacLean, *A Moral Requirement for Energy Policies*, in ENERGY, *supra* note 2, at 181-82.

28. Kirsch, *supra* note 23, at 391.

29. One author writes:

> I have to confess that I go on my selfish and polluting way with a certain amount of bad conscience—as I imagine you do. But your guilty self-indulgences may bother you a little less if you try to believe—as I do—that we are not obligated to future others.

Thompson, *supra* note 23, at 202.

30. U.S. CONST. preamble.

31. Address by Henry Steele Commager, John F. Kennedy Center for the Performing Arts, in Washington, D.C. (March 17, 1976), *quoted in* Gardner, *supra* note 2, at 37.

notes of James Madison record numerous remarks by Constitutional delegates that show a preoccupation with future generations.[32] Reading these remarks, it becomes clear that the framers of the Constitution showed a particularly strong concern for the distant future, and intended to create a system "providing for our posterity, for our children and our grandchildren . . . ."[33]

More recently, a number of federal statutes have made reference to intergenerational goals. The National Historic Preservation Act of 1966[34] declared the policy of Congress "to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation."[35] The 1980 amendments to the Act reemphasized its purpose to "fulfill the social, economic, and other requirements of present and future generations."[36] Although historic preservation leads to many nonintergenerational benefits, the legislative history of the Act indicates that its primary goals are intergenerational.[37]

The National Environmental Policy Act of 1969[38] [NEPA] includes similar objectives. Under NEPA the federal government is directed to "use all practical means" to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[39] Courts construing the purposes of NEPA have concluded that it was intended to accomplish much more than confer environmental benefits upon the present generation. According to these courts, NEPA requires careful evaluation of federal actions in light of their effects on future generations.[40] In addition to NEPA and the National Historic Preservation Act, several other federal and state statutes suggest intergenerational objectives, including the Wilderness Act,[41] the Endangered Species

32. For examples and discussion of such remarks by the framers, see generally Gardner, *supra* note 2, at 37.

33. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787 3 (remarks of Roger Sherman), *quoted in* Gardner, *supra* note 2, at 37.

34. 16 U.S.C. § 470 (1982).

35. *Id.* § 470(b)(5).

36. *Id.* § 470-1(1), (3). This declaration of policy was added to the Act by Pub. L. 96-515, Title I, § 101(a), 94 Stat. 2988 (1980) (codified at 16 U.S.C. § 470-1 (1982)).

37. *See* H.R. REP. NO. 1457, 96th Cong., 2d Sess., 21, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6378, 6384; *see also* Cobble Hill Ass'n v. Adams, 470 F. Supp. 1077 (S.D.N.Y. 1979) (purpose of Act was to protect our historical heritage from extinction).

38. 42 U.S.C. §§ 4321-4361 (1982).

39. *Id.* § 4331(b)(1).

40. *See* Richland Park Homeowner Ass'n v. Pierce, 671 F.2d 935 (5th Cir. 1982); Swain v. Brinegar, 517 F.2d 766 (7th Cir. 1975).

41. 16 U.S.C. §§ 1131-1136 (1982).

Act,[42] the Clean Air[43] and Water[44] Acts, the Minnesota Environmental Rights Law,[45] and the South Dakota Environmental Protection Act of 1973.[46]

Like the goals of the rights theorists considered previously, the intergenerational goals expressed in these statutes meet with considerable conceptual frustration in practice. This frustration again results from an individualized conception of rights and injuries. Although case authority adjudicating the claims of future generations is, as one might expect, quite sparse,[47] the standing doctrine as applied in suits brought on behalf of environmental entities provides a useful example of the barriers posed by an individualistic conception of justice.

C. *The Standing Doctrine*

In June of 1969 the Sierra Club brought suit in federal district court to enjoin the United States Forest Service from granting construction permits to Walt Disney Enterprises.[48] These permits would have allowed Disney to begin construction of a $35 million entertainment complex and ski resort in the Mineral King Valley, a wilderness area located in Sequoia National Park. The Disney project would have required, among other things, the construction of a highway and high voltage power line, both of which would be twenty miles long and traverse the National Park.[49] The Sierra Club hoped to prevent the Disney construction, and sought judicial review of the Forest Service's action under section ten of the Administrative Procedure Act.[50] The district court issued a preliminary injunction and rejected the Secretary of the Interior's challenge to the Sierra Club's standing to sue.[51] On appeal, the Court of Appeals for the Ninth Circuit reversed on the standing issue, holding that

42. 16 U.S.C. § 1531 (1982).

43. 42 U.S.C. §§ 7401-7642 (1982).

44. 33 U.S.C. §§ 1251-1345, 1361-76 (1982).

45. MINN. STAT. ANN. §§ 116B.01-.03 (West 1987).

46. S.D. CODIFIED LAWS ANN. §§ 34A-10-1 to -10-15 (West 1986).

47. *But cf.* Cape May Co. Chapter, Izaak Walton League of Am. v. Macchia, 329 F. Supp. 504 (D.N.J. 1971) (holding that class including individuals "yet unborn" had standing to sue under NEPA). The value of this case as precedent is questionable, however, since the class also included an environmental group and numerous identifiable living individuals. There are no recorded actions in which a plaintiff class consisted solely of future generations.

48. *See* Sierra Club v. Morton, 405 U.S. 727, 730 (1972).

49. *See id.* at 729.

50. 5 U.S.C. § 702 (1982).

51. District Judge Sweigert's order granting the preliminary injunction is not reported in the Federal Supplement. However, his ruling is discussed in the Supreme Court's opinion in Sierra Club v. Morton, 405 U.S. at 730-31.

the Sierra Club had not alleged that any of its members would be affected by the Mineral King development beyond the fact that "the actions are personally displeasing or distasteful to them."[52] The United States Supreme Court granted the Sierra Club's petition for certiorari.[53]

While the case was pending before the Supreme Court, Christopher Stone published his article *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*.[54] Stone argued that natural objects themselves should be conceived as jural entities capable of suffering legally compensable wrongs.[55] Under this view, the Sierra Club would be seen as Mineral King's guardian ad litem suing on behalf of the valley itself.[56] Although the article had not been published in time for the lawyers to use this approach in their briefs and arguments, the article did find its way into the hands of the justices before a decision in the case was reached.[57] The majority opinion in *Sierra Club v. Morton*[58] did not address the questions raised by the article because the questions had not been raised by the parties. The three dissenting justices, however, agreed with Stone. Justice Douglas opened his dissent by asserting that the standing doctrine "would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated . . . in the name of the inanimate object. . . . This suit would therefore be more properly labeled as *Mineral King v. Morton*."[59] In a separate dissent, Justice Blackmun, joined by Justice Brennan, endorsed this "imaginative expansion" of the standing doctrine.[60]

Though not expressly addressing the novel version of the standing rule advocated by Stone and the dissenting justices, the majority implicitly rejected such an "imaginative expansion."[61] Relying on earlier cases construing section ten of the Administrative Procedure Act, the Court stated that a party seeking judicial review under the Act must satisfy a

52. Sierra Club v. Hickel, 433 F.2d 24, 33 (9th Cir. 1970).

53. Sierra Club v. Morton, 401 U.S. 907 (1971) (order granting certiorari).

54. Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

55. *Id.* at 452.

56. Stone, *supra* note 1, at 2.

57. C. STONE, SHOULD TREES HAVE STANDING? xiv (1974).

58. 405 U.S. 727 (1972). It should be noted that Justices Powell and Rehnquist, newly appointed to the Court, did not take part in the four to three decision.

59. *Id.* at 741-42.

60. *Id.* at 757.

61. *Id.* at 734-35.

two part test.[62] First the party must allege that the administrative action at issue has caused them to suffer an "injury in fact"; second, the injury must be shown to affect a right or interest that is "arguably within the zone of interests to be protected or regulated" by the federal statute which the agency is alleged to have violated.[63]

In *Sierra Club*, the Court found that the injury in fact part of the standing test had not been satisfied. The Court characterized the injury threatened by the Disney construction as occurring "entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area."[64] Acknowledging that this type of harm would under some circumstances amount to an "injury in fact" sufficient to confer standing, the Court held that the proper circumstances were not present in the allegations as set forth in the Sierra Club's complaint.[65] The complaint was defective because no injury was alleged to have been directly experienced by a person before the Court. The Court emphasized that the injury in fact test requires that "the party seeking review be himself among the injured."[66] Although it rejected the Sierra Club's assertion of standing, the Court nevertheless made it clear that an amended complaint would meet the standing requirement if it alleged harms suffered to an "individualized interest."[67] Taking its cue from the Court, the Sierra Club submitted an amended complaint alleging that some of its members' enjoyment of the park would be impaired as a result of the Mineral King Construction.[68] The amended complaint was sufficient to satisfy the requirements for standing, and the Mineral King Valley remained undeveloped.[69]

In emphasizing the need for an individualized injury to confer standing, the *Sierra Club* Court created what amounts to a legal fiction. A legal fiction is "any assumption which conceals, or effects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."[70] The motivating force behind the Sierra Club action was not a concern for the camping enjoyment of a

62. The Court relied on Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 157 (1970). *See* Sierra Club v. Morton, 405 U.S. at 733.

63. Sierra Club v. Morton, 405 U.S. at 733.

64. *Id.* at 734.

65. *Id.* at 734-35.

66. *Id.* at 735.

67. *Id.* at 736 n.8.

68. Sierra Club v. Morton, 348 F. Supp. 219, 220 (N.D. Cal. 1972) (amended complaint) (motion to dismiss amended complaint denied).

69. *See* Stone, *supra* note 1.

70. H. MAINE, ANCIENT LAW 25 (C. Harr ed. 1963).

handful of its members. Clearly there was more at stake. As Christopher Stone recently pointed out, the real issue "was not how all that gouging of roadbeds would affect the Club and its members, but what it would do to the valley."[71] Despite this obvious fact, the Court saw the only actionable harm to be that to the instrumental satisfaction of individual backpackers.[72] So formulated, the standing doctrine did allow the Sierra Club and similar groups to bring environmental claims before the courts.[73] But this formulation also blurs the fundamental issues of what is being harmed and why a court should intervene.

The legal fiction of the *Sierra Club* holding becomes even clearer in *United States v. Students Challenging Regulatory Agency Procedures*[74] [*SCRAP*]. In *SCRAP*, a group of Washington, D.C. law students formed an ad hoc committee in order to bring an action challenging a railroad rate increase approved by the Interstate Commerce Commission.[75] The students claimed that the rate increase would cause them to suffer individualized injuries by increasing the amount of litter in the Washington, D.C. area. Their reasoning suggested that the rate hike would lead manufacturers to rely increasingly on nonrecyclable goods. Due to the resulting higher demand for resources nationwide (including Washington), and the increasing use of nonbiodegradable materials, more litter would find its way into Washington. This litter would then impair the individual students' enjoyment of the area's natural resources.[76] Though the Court expressed its uneasiness with this "attenuated line of causation to the eventual injury,"[77] it still found the type of "specific and perceptible harm" required in order to confer standing on the student group.[78]

It is frequently argued that the individualized standing rules articulated in cases like *SCRAP* and *Sierra Club* have important roots in the separation of powers structure of American government.[79] According to

71. Stone, *supra* note 1, at 2.

72. *See* Sierra Club v. Morton, 405 U.S. at 735.

73. *See, e.g.*, Scherr v. Volpe, 336 F. Supp. 882 (W.D. Wis. 1971), *aff'd*, 466 F.2d 1027 (7th Cir. 1972) (construction of highway); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alaska 1971) (construction of paper mill).

74. 412 U.S. 669 (1973).

75. *Id.* at 672.

76. *Id.* at 688-89; *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 86 (1978).

77. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. at 688.

78. *Id.* at 688-89. Although they cleared the standing hurdle, the student group eventually lost on the merits. *See* Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures, 422 U.S. 289 (1975).

79. *See, e.g.*, L. TRIBE, *supra* note 76, at 82; Scalia,*The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 428-30 (1974).

this view, the constitutionally appropriate role of courts is limited to resolving controversies directly affecting individual parties. The fear is that, without such limitations, the courts will become "roving commission[s] to enforce the judges' own views of legality, or to vindicate bystander interests in the rule of law."[80] This view finds frequent expression in the constitutional maxim that a litigant may not seek redress for merely generalized injuries suffered by the public at large.[81]

While a desire to preserve the intended function of courts is justifiable, the use of the separation of powers rationale as a blanket justification for conceptually bizarre results like *SCRAP* tends to obscure what is at stake in these types of cases. The suits are motivated by a desire to protect diffuse interests in ecological integrity. Although the complaints are geared toward emphasizing individualized injuries, such injuries are clearly secondary in the minds of the litigants to the goal of maintaining an undegraded environment.[82] The plaintiffs bring the suits within the rules of a legal fiction in order to achieve their desired objectives. The legal fiction allows environmental claims to be heard in courts, but it also has a more troubling effect. By stressing the need for individualized impacts, the legal fiction reinforces an individualized conception of rights and injuries. Only individuals can have standing to sue, even though their real motivation is nonindividualized. As previously suggested, the individualized conception of rights has been a primary cause of much of the confusion in theoretical discussions of intergenerational justice.[83] The standing doctrine only perpetuates this confusion. As Lawrence Tribe notes:

> While the environmentalist may feel somewhat disingenuous in taking this approach, he is likely to regard it as justified by the demands of legal doctrine and the exigencies of political reality. What the environmentalist may not perceive is that, by couching his claim in terms of human self-interest—by articulating environmental goals wholly in terms of human needs and preferences—he may be helping to legitimate a system of discourse which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the initial impetus for his own protective efforts.[84]

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80. L. TRIBE, *supra* note 76, at 82.

81. *See, e.g., Ex parte* Levitt, 302 U.S. 633 (1937); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

82. *See* Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1330-31 (1974).

83. *See supra* Section II(A).

84. Tribe, *supra* note 82, at 1330-31.

Much of the previous discussion of the standing doctrine has involved environmental claims rather than intergenerational claims per se. In part, this is due to a scarcity of cases dealing explicitly with intergenerational issues.[85] The standing doctrine as applied in cases like *Sierra Club* and *SCRAP* has relevance to an analysis of intergenerational rights for at least two reasons, however. First, like future generations, the environment represents an "unconventional entity" upon which to confer legally recognizable rights.[86] Second, and perhaps more importantly, intergenerational concerns are often embedded within the environmental concerns addressed in the cases.[87] Sometimes these intergenerational concerns are openly expressed,[88] but more often they are found just below the surface of more explicit discussions of environmental issues.

Under the current standing doctrine, it would probably be difficult to bring a justiciable claim before a court solely on intergenerational grounds.[89] At least in the environmental suits, the harm sought to be prevented could be associated with the concrete satisfactions of an actual litigant.[90] If a suit were brought on behalf of future generations, it would be difficult to tie the harm to a living person.[91] As the Court has stressed, a person who is actually a party in the suit must "be himself among the injured."[92] It is unlikely that a person suing solely on behalf of future generations could establish the "distinct and palpable injury to himself"[93] that the standing doctrine requires.

Intergenerational rights theories and experience under the environmental standing cases show that an individualistic conception of injury and responsibility is deeply embedded in current rights analysis. Because of the individualistic focus of rights, it becomes practically impossible to understand presently nonexistent persons as being the holders of individual rights. Thus, the rights approach to intergenerational justice begins to collapse when it attempts to confer currently enforceable rights to indi-

85. *See supra* note 47 and accompanying text.

86. The term "unconventional entity" is used by Stone to refer to "lakes and mountains . . . robots and embryos, tribes and species, future generations and artifacts." Stone, *supra* note 1, at 8.

87. *Id.* at 47-50.

88. *See, e.g., Sierra Club*, 405 U.S. at 734 (stating that the Disney project might "impair the enjoyment of the park for future generations"). *See also* cases cited *supra* notes 40, 47.

89. *See supra* note 47 and accompanying text.

90. *See* cases cited *supra* note 73.

91. One possibility might be to assert that the knowledge of potential harm to future generations impairs a plaintiff's feeling of intergenerational fairness. This argument would probably fail, however.

92. *Sierra Club*, 405 U.S. at 735.

93. Warth v. Seldin, 422 U.S. 490, 501 (1975).

viduals not yet born. Although the language of rights may serve to partially articulate one's concern for succeeding generations, the limitations of this language prevent one from actually protecting their interests.

III. THE COST-BENEFIT ALTERNATIVE

One way around the obstacles posed by rights analysis might be to employ a nonindividualistic approach to intergenerational justice. American law provides a competing economic approach which, superficially at least, is nonindividualistic. This competing approach uses cost-benefit analysis as a method of assessing and choosing among policies that affect future generations.[94] Cost-benefit analysis seeks to objectively measure the future effects of present actions by first reducing all values to a common metric, usually dollars.[95] Thus expressed, the short- and long-term costs of an action can then be compared with the expected benefits of the action. If the calculation yields a net surplus of benefits, then theoretically, the action will be worthwhile.[96]

Cost-benefit analysis has its theoretical roots in the philosophy of utilitarianism.[97] Unlike the version of rights analysis advocated by Rawls and others, utilitarianism asserts the primacy of overall good over individual rights. Some theorists have attempted to place intergenerational justice in a utilitarian framework.[98] According to this line of reasoning, the present generation has obligations to future generations, but the obligations "are not owed to assignable persons but are obligations to maximize utility."[99] Used in this sense, "utility" refers to the general

94. The intergenerational application of cost-benefit analysis is found most often in environmental policy assessments and energy planning. For examples and discussion, see Burness, *Practicably Irrigable Acreage and Economic Feasibility: The Role of Time, Ethics, and Discounting*, 23 NAT. RESOURCES J. 289 (1983); Kneese, Ben-David & Schulze, *The Ethical Foundations of Benefit-Cost Analysis*, in ENERGY, *supra* note 2, at 59; MacLean, *A Moral Requirement for Energy Policies*, in ENERGY, *supra* note 2, at 180; Nijkamp, *Equity and Efficiency in Environmental Policy Analysis: Separability Versus Inseparability*, in DISTRIBUTIONAL CONFLICTS, *supra* note 23, at 59; O'Toole & Walton, *supra* note 2; Routley, *Nuclear Energy and Obligations to the Future*, in RESPONSIBILITIES, *supra* note 2, at 277.

95. *See* I. BARBOUR, TECHNOLOGY, ENVIRONMENT, AND HUMAN VALUES 173 (1980); Hurter, Tolley & Fabian, *Benefit-Cost Analysis and the Common Sense of Environmental Policy*, in COST-BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATIONS: POLITICS, ETHICS, AND METHODS 87, 91 (1982) [hereinafter COST-BENEFIT ANALYSIS].

96. *See* I. BARBOUR, *supra* note 95, at 169.

97. *Id.* at 168.

98. *E.g.*, Narveson, *Utilitarianism and New Generation*, 76 MIND 62 (1967); Sikova, *Is it Wrong to Prevent the Existence of Future Generations?*, in OBLIGATIONS, *supra* note 2, at 112; Stearns, *Ecology and the Indefinite Unborn*, 56 MONIST 612 (1973); Sumner, *Classical Utilitarianism and the Population Optimum*, in OBLIGATIONS, *supra* note 2, at 91.

99. Stearns, *supra* note 98, at 621.

happiness of humans now living and yet to be born. Social decisions are made according to a utility principle, and the best decisions are those calculated to maximize the total happiness of present and future generations. However, in order to make such utility calculations work, it is necessary to limit at some arbitrary point the number of future generations that will count in the calculus. Without this limitation, a potentially infinite number of future generations would swamp the claims of present generations.[100] This would dictate a policy of extreme sacrifice on the part of present generations, since such a policy would be necessary to fulfill the needs of infinitely distant generations.[101]

A. *Discounting*

In the typical form of cost-benefit analysis, limitations on the number of generations that count in the cost-benefit calculus are expressed as a discount rate.[102] Instead of according the utility of future generations full weight up to an arbitrary cutoff point, the discount rate gradually diminishes the weight of future costs and benefits by a certain percentage per year. At a discount rate of five percent, for example, the effects next year of an action taken today count for ninety-five percent of the action's immediate impact. In two years, expected benefits are counted at 90.25 percent; in three years, 85.74 percent, and so on.[103] From the standpoint of intergenerational justice, the use of a discount rate has the obvious effect of undervaluing the importance of occurrences in the distant future. If, for example, we are deciding whether to build a nuclear power plant near a populated area, a five percent discount rate would assign a lesser value to 15,000 deaths in 200 years than it would to

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100. A related point is made by Stone:

> Does anyone seriously propose to count the interests of each future person equally with a contemporary's—to make of all humans through time one big moral community? Such a commitment has to deal with the fact that, because there are potentially so many of *them* relative to the mere four billion of us presently on the planet, the aggregate weight of their interests will simply swamp ours, effectively leaving our wants to count, in the final analysis, for naught. There is no way out through straight-forward comparisons of utility; there are questions of *justice* that cannot be ducked.

Stone, *supra* note 1, at 48 (emphasis in original).

101. *See* Narveson, *Future People and Us*, in OBLIGATIONS, *supra* note 2, at 38.

102. The essays collected in ENERGY, *supra* note 2, provide an excellent overview of the discounting issue. *See especially* Parfit, *supra* note 25, at 31.

103. The equation for making discount rate calculations is:

$$FV = PV(1 + d)^t \text{ where:}$$

FV = future value; PV = present value; d = the discount rate; and t = time.
See W. BAUMOL & A. BLINDER, ECONOMICS 543-44 (1979).

one death next year.[104] Thus, unless the discount rate approaches zero, cost-benefit analysis tends to externalize the safety risks of our present actions onto future generations.

Three independent rationales have been put forth to justify the application of a discount rate in intergenerational cost-benefit analyses. The first relates to the opportunity cost of capital and follows an investment metaphor.[105] If society chooses to invest resources in a project, it necessarily takes resources away from other possible uses. The opportunity cost of investing in the chosen project is simply the potential value of the other uses that must be forgone when resources are diverted to the chosen project.[106] Opportunity costs make it profitable to receive benefits earlier, since the benefits can then be used to produce additional benefits.[107] To account for benefits forgone from a resource investment, the future returns from that investment are diminished by a discount rate.[108]

Another type of argument emphasizes society's inability to forecast the future with any degree of certainty.[109] Since cost-benefit analysis requires reliable data, we should accord less weight to speculative or uncertain information.[110] The reliability of our knowledge with respect to a future event decreases in proportion to the remoteness of the event. A discount rate accounts for this uncertainty by weighing future costs and benefits less heavily than present ones which can be more reliably estimated. Moreover, since society cannot accurately predict future scientific developments, there is always the potential for a "major technological breakthrough."[111] Such a breakthrough may make our present concerns about the future seem pointless.[112]

The third argument in favor of the discount rate centers on a perceived human incapacity to empathize with remote generations.[113] According to this view, individuals are assumed to care more about their own children than about their more remote descendants. Similarly, society is assumed to prefer policies that favor present generations. It is argued that society, like an individual, should express a time preference

104. Using a five percent discount rate, one death this year equals 17,292 deaths in 200 years. These calculations are obtained with the future value equation, *supra* note 103.

105. *See* Burness, *supra* note 94, at 294.

106. W. BAUMOL & A. BLINDER, *supra* note 103, at 605.

107. Parfit, *supra* note 25, at 33.

108. Burness, *supra* note 94, at 294.

109. *See* Parfit, *supra* note 25, at 32-33.

110. *Id.* at 33.

111. *See* Thompson, *supra* note 23, at 197.

112. O'Toole & Walton, *supra* note 2, at 61.

113. *See, e.g.*, MacLean, *supra* note 94, at 189; Parfit, *supra* note 25, at 35-36.

that weighs future effects less heavily over time.[114] The social discount rate simply mirrors society's time preference.

The three types of arguments advanced to support the discount rate seem plausible on the surface. But there is a disturbing sense in which the discount rate trivializes our moral beliefs about responsibility and ethical judgment. Although a person might care more about what happens to his children, it is doubtful that he holds virtually no concern for his great-grandchildren. Yet the use of a discount rate has precisely this effect. Moreover, by requiring all items to be expressed in monetary terms, cost-benefit analysis tends to undervalue such things as human life and health which do not lend themselves to accurate pricing.[115] Analysts can and do assign monetary values to human life and health by calculating hospital expenses, lost income, and other items,[116] but somehow these numbers fail to express the worth of a healthy living person.

B. *Ethics*

The ethical problems associated with using cost-benefit analysis to make decisions affecting human health and safety were demonstrated by the Ford Motor Company's continued production of a highly dangerous automobile in the early and mid 1970s. Ford became aware that a design flaw in the gas tank assembly of the Pinto made the car abnormally prone to explosions in rear-end collisions.[117] Internal Ford memoranda indicated that an eleven dollar part would correct the design flaw and sharply reduce the number of explosions, but that it would cost the company a total of $137 million to correct the flaw. Ford also estimated that the approximately 180 burn deaths and 180 serious burn injuries caused per year by the defect would lead to the company paying out a total of $49.5 million in tort claims. The cost-effective solution was to continue producing defective cars, not warn the public of danger, and absorb the tort claim awards as they occurred.[118] According to the testimony of the engineer in charge of Ford's crash-testing program, Ford executives de-

114. Burness, *supra* note 94, at 294.

115. For discussion and criticism of the practice of assigning prices to nonmonetary values in cost-benefit analysis, see generally Kelman, *Cost-Benefit Analysis and Environmental, Safety, and Health Regulation: Ethical and Philosophical Considerations*, in COST-BENEFIT ANALYSIS, *supra* note 95, at 143-48; Sagoff, *At the Shrine of Our Lady of Fatima or Why Political Questions are Not All Economic*, 23 ARIZ. L. REV. 1283, 1285-87 (1981).

116. *See* I. BARBOUR, *supra* note 95, at 172-74 (method of pricing of health and life in risk-benefit analysis).

117. For a full account of the Ford Pinto story, see L. STROBEL, RECKLESS HOMICIDE? (1980).

118. *Id.* at 79-92, 286.

cided to continue producing defective Pintos knowing that the gas tank "was vulnerable to puncture and rupture at low rear impact speeds creating a significant risk of death or injury from fire and knowing that 'fixes' were feasible at nominal cost .... [M]anagement's decision was based on the cost savings which would inure from omitting or delaying the 'fixes.' "[119] As a result of Ford's decision, many people died or were seriously burned in explosions after rear-end collisions. When news of the Ford decision eventually reached the public, the reaction was almost universally one of shock and condemnation.[120] Although a cost-benefit analysis dictated the continued production of defective Pintos, this decision was clearly intolerable from an ethical perspective.[121]

C. *Manipulability*

In addition to undervaluing nonmonetary and ethical values, cost-benefit analysis has proven to be highly manipulable in practice. The decision to set the discount rate at a certain percentage determines how much future risks count in the decision-making process.[122] The discount rate ultimately chosen often reflects arbitrary judgments about opportunity costs and the probability of future events.[123] Furthermore, decision makers often overestimate benefits in an effort to make a project or policy appear as desirable as possible.[124] Long-term costs or risks are frequently underestimated or ignored entirely.[125] Numerous critics have pointed out how cost-benefit analysis can serve to mask the economic interests of decision makers.[126] The Reagan administration, for example, has instituted mandatory cost-benefit analyses for executive agencies in order to foster a more favorable business climate for regulated industries.[127]

The manipulability of cost-benefit analysis can be demonstrated by

119. Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 777, 174 Cal. Rptr. 348, 361 (1981).

120. *See* L. STROBEL, *supra* note 117, *passim*.

121. *See* Malloy, *Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163, 175-77 (1986).

122. *See supra* Section III(A).

123. *See* Andrews, *Cost-Benefit Analysis and Regulatory Reform*, in COST-BENEFIT ANALYSIS, *supra* note 95, at 123; *supra* notes 105-114 and accompanying text.

124. *See infra* notes 141-43 and accompanying text.

125. *See* cases cited *infra* notes 137-42.

126. *E.g.*, A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (4th ed. 1984); Sagoff, *supra* note 115, at 1287-89; Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1979).

127. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601, at 431 (1982); Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C. § 601, at 40 (Supp. II 1984).

examining the brief history of environmental impact statements under NEPA. As discussed previously, a central purpose of NEPA was to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[128] This broad goal was implemented through a requirement that a "detailed statement" be prepared for each "major Federal action significantly affecting the quality of the human environment . . . ."[129] These environmental impact statements are not cost-benefit analyses in a strict sense, since exact dollar values need not be placed on all environmental impacts.[130] Nevertheless, by requiring a balancing of environmental harms against economic benefits, environmental impact statements under NEPA follow the traditional cost-benefit approach.[131] This approach was "designed to give previously unquantified environmental amenities appropriate weight in decision making . . . ."[132] It was hoped that NEPA would effectuate substantive changes in agency decision-making norms so that a high degree of environmental quality could be maintained over many years.[133]

Since NEPA became effective in 1970, approximately 1,000 to 1,400 environmental impact statements have been prepared each year.[134] These statements suffer from the same manipulability that has characterized other cost-benefit regimes.[135] Courts have consistently held that NEPA requires agency decision makers to be particularly sensitive to the future effects of their actions.[136] Despite this expressed concern, it is clear that future consequences can be ignored or highly discounted by the decision maker, unless the likelihood that a particular consequence will in fact occur reaches a certain level of probability.[137] The courts typically label the risks which fall below this level as "speculative" or "remote" conse-

128. 42 U.S.C. § 4331(b)(1) (1982); *see supra* notes 38-40 and accompanying text.

129. 42 U.S.C. § 4332(2)(C) (1982).

130. *See* Environmental Defense Fund, Inc. v. Costle, 439 F. Supp. 980 (S.D.N.Y. 1977).

131. *See* Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm., 449 F.2d 1109 (1971) (NEPA held to require "balancing" of economic and environmental costs and benefits).

132. Environmental Defense Fund, Inc. v. Army Corps of Engineers, 348 F. Supp. 916, 918 (D. Miss.), *aff'd*, 492 F.2d 1123 (5th Cir. 1972).

133. *See* Trinity Episcopal School Corp. v. Harris, 445 F. Supp. 204 (S.D.N.Y. 1978).

134. Andrews, *supra* note 123, at 121.

135. *See* Note, *The NEPA Model for the Protection of Coastal Aesthetics: The View From the Courts*, 28 BUFFALO L. REV. 817 (1979).

136. *See* Cady v. Morton, 527 F.2d 786 (9th Cir. 1975); Richland Park Homeowners Ass'n v. Pierce, 671 F.2d 935 (5th Cir. 1982); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981).

137. *See* Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984); Warm Spring Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980); South Louisiana Envtl. Council v. Sand, 629 F.2d 1005 (5th Cir. 1980).

quences. Included among the predictions rejected by courts as remote or speculative are the predictions of a dam failure in the wake of an earthquake in southern California,[138] predictions of costs resulting from increased population in a flood plain area,[139] and predictions of adverse impacts on bottom-dwelling organisms as a result of the development of oil and gas wells on Alaska's outer continental shelf.[140] One court rejected numerous predictions of adverse environmental impacts in a suit challenging the proposed development of a deepwater port and crude oil distribution system.[141] At the same time, the court noted that the Army Corps of Engineers "chose to trumpet" the benefits of the project, and intended the environmental impact statement to serve primarily as a "selling point" of the project's beneficial aspects.[142] Although NEPA appeared to show a great deal of initial promise, the environmental impact statements for which the Act is primarily known have proven no less manipulable than the typical cost-benefit analysis. Like the typical cost-benefit analysis, environmental impact statements can be used to "justify anything."[143]

D. *The Individualistic Core of Cost-Benefit Analysis*

This section of the Comment began by contrasting the individualism of rights analysis with the apparent nonindividualism of cost-benefit analysis. The nonindividualistic aspect of cost-benefit analysis was seen in its basic utilitarian approach—to choose the one action or policy among several options which will lead to the greatest good for the greatest number.[144] In theory, cost-benefit analysis sacrifices the right of the individual for the good of all.

This section then showed three reasons why the utilitarian goals of cost-benefit analysis break down in practice. First, cost-benefit analysis

138. Warm Springs Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980).

139. South Louisiana Envtl. Council v. Sand, 629 F.2d 1005 (5th Cir. 1980).

140. Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983), *aff'd*, 733 F.2d 605 (9th Cir. 1984).

141. Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983).

142. *Id.*

143. Andrews, *supra* note 123, at 123. Andrews writes:

> Depending on the assumptions used, for instance, environmental impact assessments have been claimed to either support or oppose such major environmental modifications as the Trans-Alaska Pipeline System and the MX Missile System. Similar choices among even more plausible assumptions could easily cause cost-benefit analysis to appear to support opposite decisions involving many environmental regulations.

Id.

144. *See supra* notes 97-101 and accompanying text.

inevitably minimizes the future consequences of an action through the use of a discount rate. Even a comparatively small discount rate attaches almost no weight to risks in one or two centuries, yet the use of discount rates is "virtually axiomatic" in cost-benefit analysis.[145] Second, it becomes exceedingly difficult to assign monetary prices to values such as human life. Sometimes attempts to assign such values result in morally shocking decisions, such as the decision by Ford to continue producing defective automobiles that it knew would cause hundreds of deaths and injuries.[146] Third, cost-benefit analysis has proven to be a highly manipulable tool in the hands of policy makers. By choosing to focus on short-term economic benefits while ignoring speculative risks, policy makers can justify projects or actions that either may not deliver as planned, or worse, may prove dangerous in years to come.[147]

In addition to an internal critique of cost-benefit analysis, there is a deeper sense in which the cost-benefit approach reinforces the individualistic focus it apparently seeks to escape. Cost-benefit analysis weighs values in order to reach the best decision for all, but the values it weighs are expressed solely in terms of the instrumental satisfaction of individuals.[148] The weight accorded to any given factor is determined by asking how much a person would be willing to pay for it. In this manner, broad-based social values are collapsed into expressions of individual preference.[149] Despite NEPA's stated objective to preserve the environment as an intrinsic goal, the value of that preservation finds articulation only in the instrumental enjoyment of individuals. Even the concern for future generations expressed in NEPA tends to be reconceptualized through cost-benefit analysis as a concern that future individuals not be deprived of the same *quantity* of satisfaction that present individuals enjoy. And in order to challenge the sufficiency of the cost-benefit analysis in an environmental impact statement, the challenging party must satisfy a similar "injury in fact" requirement as that set forth in *Sierra Club v. Morton*.[150] The plaintiffs must show that they themselves are adversely affected by the administrative action. As in *Sierra Club*, this requirement is not difficult to meet. As one court held, "[p]ersonally felt aesthetic or conserva-

145. Patridge, *Can We, and Should We, Care About Future Generations?*, in RESPONSIBILITIES, *supra* note 2, at 188.

146. *See supra* notes 117-21 and accompanying text.

147. *See supra* notes 138-43 and accompanying text.

148. *See* Kelman, *supra* note 115, at 142-45.

149. *See* Sagoff, *supra* note 115, at 1295-98.

150. *See, e.g.*, Robinson v. Knebel, 550 F.2d 422, 424 (8th Cir. 1977).

tional harm is sufficient . . . ."[151] But the need to translate broad environmental and intergenerational goals into the vocabulary of individualism tends to undermine the goals themselves.

IV. TOWARD A NONINDIVIDUALISTIC CONCEPTION OF INTERGENERATIONAL JUSTICE

Rights theory and cost-benefit analysis create obstacles to our understanding of intergenerational justice. Although both approaches start from a basic recognition that people care about the well-being of future generations,[152] both tend to break down when this understanding is articulated in theories that presuppose an individualistic, selfish human nature. The conflict between the phenomenon of caring for the future and efforts to understand this phenomenon through individualistic theories has led to the frustration of the very goals the theories hoped to achieve. In attempting to escape this self-defeating circle, one should look to alternative theories and legal structures compatible with a nonindividualistic conception of human nature.

In rethinking intergenerational justice from a nonindividualistic perspective, it is not necessary to demand the formation of an idealized intergenerationally just society. Although one can imagine the characteristics of such a society, including decentralized political structures and self-sustaining forms of energy and food production,[153] it would be a mistake to conclude that all efforts must be directed toward the immediate realization of this goal. While a utopian society can serve as an ideal against which present social institutions may be judged, the utopian vision itself may be too far removed from our historical experience to hold out any hope of attainment.[154] Given the limitations of our experiences and backgrounds, it would appear that a nonindividualized approach to intergenerational justice needs to be worked out within the ideas and legal structures presently available. The task is to use these ideas and structures in ways that are consistent with a nonindividualistic

151. Lake Erie Alliance for Protection of Coastal Corridor v. Army Corps of Engineers, 486 F. Supp. 707 (D. Pa. 1980).

152. As one author puts it, "well-functioning human beings identify with, and seek to further, the well-being, preservation, and endurance of communities, locations, causes, artifacts, institutions, ideals, and so on, that are outside themselves and that they hope will flourish beyond their own lifetimes." Partridge, *Why Care About the Future*, in RESPONSIBILITIES, *supra* note 2, at 204.

153. *See, e.g.*, B. BROWNELL, THE HUMAN COMMUNITY (1950); B. DEVALL & G. SESSIONS, DEEP ECOLOGY (1985).

154. *See generally* R. UNGER, KNOWLEDGE & POLITICS 236-62 (1975) (critique of pure utopianism).

conception of human nature.[155]

Some scholars have argued that if the rhetoric and structure of rights can be properly reformulated, rights theory can escape the contradictions of individualism and serve to protect communitarian aspects of life.[156] A reformulated version of rights theory has been used with some success by advocates of the rights of animals and environmental entities.[157] According to these advocates, the evolution of rights correlates with the evolution of human morality. As human society advances it undergoes periods of enhanced sensitivity to persons and objects that had not previously been understood as having moral or legal significance. Such periods of enhanced sensitivity lead to the expansion of legal rights to embrace new classes of persons and objects. Thus, the recognition of the rights of animals and environmental entities is seen as part of the same historical progression that recognized new rights for blacks, women, and children.[158]

Given an historically expanding conception of legal rights, it is conceivable that unborn generations could, over time, become legally protected entities. As society's moral capabilities expand to include an increasing sensitivity to the well-being of future generations, one might come to accept the rights of the unborn as we previously came to accept the rights of animals and environmental objects.

This approach to intergenerational justice is appealing, since it articulates society's intuitive concern for the future in a familiar legal form.

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155. Roberto Unger writes:

> Most of our recognized moral duties to each other and especially those that characterize communities arise from relationships of interdependence that have been only partially articulated [by prevailing legal conceptions] . . . .
>
> These reformed varieties of communal experience *need to be thought out in legal categories and protected by legal Rights*: not to give these reconstructed forms of solidarity and subjectivity institutional support would be—as current experience shows—merely to abandon them to entrenched forms of human connection at war with our ideals.

Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 598 (1983) (emphasis added), *quoted in* Lynd, *Communal Rights*, 62 TEXAS L. REV. 1417, 1421 n.14 (1984).

156. For a forceful presentation of this argument, see Lynd, *supra* note 155.

157. *See, e.g.*, P. SINGER, ANIMAL LIBERATION (1975); C. STONE, *supra* note 57; Tribe, *supra* note 82.

158. *See* P. SINGER, *supra* note 157, at 1-26; C. STONE, *supra* note 57, at 3-4, 43-44. As Tribe writes:

> [T]he very process of recognizing *rights* in those higher vertebrates with whom we can already empathize could well pave the way for still further extensions as we move upward along the spiral of moral evolution. It is not only the human liberation movements— involving first blacks, then women, and now children—that advance in waves of increased consciousness.

Tribe, *supra* note 82, at 1345 (emphasis in original).

However, there is a critical difference between future generations and animals or environmental objects which makes a reformulated rights approach much less likely to succeed in the intergenerational context. Whereas animals and trees are discreet, presently identifiable entities to which rights can be assigned, future generations are not. Because one cannot isolate the individual members of distant generations, it becomes difficult to think of future individuals as possessing rights in the present. This suggests that a reformulated rights approach would be likely to bog down in the same contradictions that have frustrated earlier efforts to understand intergenerational justice within the structure of rights theory.[159]

To achieve a better understanding of intergenerational justice, one should instead strive to reshape legal categories that do not rely on the language and structure of individual rights. To date, the most valuable work in this direction has been done by Edith Brown Weiss.[160] Weiss argues that the law of charitable trusts offers a useful doctrinal structure for the analysis of intergenerational issues. Under the charitable trust analogy, each generation would serve as a trustee of the "planetary trust" for the benefit of all future generations.[161] The planetary trust would be administered according to common principles of trust administration, including the avoidance of waste and diversification against risk.[162] While the representation of future generations would remain a difficult problem, certain measures could be taken to monitor the preservation of the planetary trust, such as the appointment of ombudsmen and global watchdog organizations.[163] In addition, courts could recognize the standing of living persons to represent the interests of future generations and in this way ensure the protection of the global heritage.[164]

The value of Weiss's trusteeship model is that it offers an analytic structure to intergenerational justice that is not chained to an individualistic definition of human nature. The planetary trust benefits all humanity. Unlike rights theory, charitable trust law does not require the existence of identifiable individuals; "all human generations, born and unborn, are beneficiaries."[165] By discussing our obligations to posterity in

159. *See supra* Section II.

160. *See* Weiss, *supra* note 2.

161. *Id.* at 502-06. According to Weiss, the corpus of the planetary trust "includes both the natural heritage of the planet and the cultural heritage of the human species." *Id.* at 502.

162. *Id.* at 510-31.

163. *Id.* at 563-80.

164. *Id.* at 569-72.

165. *Id.* at 503.

terms of humanity's common planetary heritage, Weiss escapes the contradictions of the individualistic approaches. This represents an important step, because the development of nonindividualistic legal categories may enable us to better fulfill our intuitive feelings of responsibility and concern for the future.

Another legal category that may have similar value is an expanded concept of duty. Generally speaking, a "duty" refers to a legally recognized obligation to conform to a particular standard of conduct toward another.[166] Although some courts speak of duty as if it existed independently in the world, most commentators recognize that the finding of a duty usually represents a conclusion by the court that liability should attach to the defendant's conduct under the circumstances of the case.[167] If, in accordance with its view of law and social policy, a court believes that a plaintiff should be entitled to protection, it will find the requisite duty on the part of the defendant. Conversely, if the court believes the plaintiff suffered a wrong which should remain legally uncompensated, no duty will likely be found. As Prosser notes, "[n]o better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists."[168]

In the way that duty is discussed in court opinions and scholarly commentary, it appears as an individualized concept. It is usually said that this particular defendant owed a duty of care to this particular plaintiff.[169] Yet the concept of duty can also be understood in nonindividualized terms. Viewed from a nonindividualistic perspective, the finding of a duty is simply a convenient way to express a judgment about where the boundaries of the morally and legally relevant group should be drawn. The task of boundary drawing is exceedingly difficult and reflects more than anything else core beliefs about moral value. Thus the finding of a duty is typically expressed in nonspecific, manipulable phrases such as the "sum total of those considerations of policy," or "where, in general, reasonable persons would recognize it and agree that it exists."[170]

Applied in the intergenerational context, the concept of duty is sufficiently broad and flexible to embrace our intuitive desires to protect fu-

166. PROSSER AND KEETON ON THE LAW OF TORTS 356 (5th ed. 1984) [hereinafter PROSSER].

167. *Id.* at 358.

168. *Id.* at 359.

169. For a relatively early expression of this concept, see Le Lievre v. Gould, 1 Q.B. 491, 497 (1893) ("The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence . . . ." (*quoted in* PROSSER, *supra* note 166, at 357 n.9)).

170. *See* PROSSER, *supra* note 166, at 358-59.

ture generations. The finding of a duty requires a determination as to what should be included within the legally protected group. The focus of the concept of duty, therefore, seems to center not on the individual but on the legally significant group as a whole. Because the concept of duty is nonindividualized, it may offer an analytic structure through which society can bring future generations within the parameters of the legally recognized and protected group.

The beginning of an expanded concept of intergenerational duty can be glimpsed in the developing field of preconception tort liability. A "preconception tort" involves the breach of a duty to a child before it is conceived, that is before a child exists or can be identified in any form. In the leading case establishing preconception tort liability, the Illinois Supreme Court recognized the breach of a duty to a plaintiff nine years before the plaintiff was born.[171] In 1965, the plaintiff's mother, then 13, was given two improper blood transfusions by hospital personnel.[172] The mother did not know about the improper transfusions until 1973, when the resulting blood condition was revealed during a routine prenatal blood test.[173] As a result of the mother's blood condition, the plaintiff was born with numerous injuries, including severe brain and nervous system damage.[174]

The *Renslow* court held that at the time the hospital performed the improper transfusions, it breached a duty of care to the as yet nonexistent child.[175] It is important to recognize that this duty has an existence that is completely independent of any duty owed to the mother. Thus, the hospital owed a duty of care to a person who was then only a possibility. The court stated that this enlarged concept of duty was an extension of the principle of foreseeability.[176] It was reasonably foreseeable that the hospital's negligent acts could later cause injury to a person, even though

171. Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977); *see also* Bergstresser v. Mitchell, 577 F.2d 22 (8th Cir. 1978) (recognizing preconception tort liability); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973) (same). New York courts apparently reject preconception tort liability. *See* Albala v. City of New York, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981).

172. The mother required Rh-negative blood but instead was negligently given Rh-positive blood. It was well known at the time that the transfusion of an incompatible blood type could cause fetal injuries if the woman receiving the transfusion later became pregnant. *Renslow*, 67 Ill. 2d at 353-54, 367 N.E.2d at 1253.

173. The hospital had earlier discovered its error but failed to warn the mother. *Id.* at 356, 367 N.E.2d at 1255.

174. *Id.* at 357, 367 N.E.2d at 1254.

175. *Id.* at 355-58, 367 N.E.2d at 1254-55.

176. *Id.*

the identity of that person was unknown at the time.[177]

Within an individualized conception of duty, the *Renslow* holding is puzzling. How can a person owe a duty to another who does not yet exist in any form? But within a nonindividualized conception of duty, the *Renslow* holding is more easily understood. From this perspective, a duty does not refer solely to legal relationships among identifiable individuals. Instead, it refers to norms of care within a group not necessarily circumscribed by time or identity. A breach of duty can occur in the present even though the identifiable harm caused by the breach may not be perceived until some time in the future. The breach of duty occurs when an act will foreseeably cause harm to one who is within the legally protected group of persons, born or unborn.

In applying an expanded concept of duty to intergenerational harms, the most difficult question is how far into the future the present generation's duties should be stretched. The *Renslow* court was willing to extend the hospital's duty to cover an act committed nine years before the person injured by the act was born. But the court also stressed that its holding would not open the door for recoveries based on acts committed much farther in the past. If faced with an injury caused by a more distant act, the court would "exercise its traditional role of drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not," and presumably deny recovery.[178]

It is noteworthy that the *Renslow* court used "current perceptions of justice" to guide its judgment that the harm in that case should be compensable, notwithstanding the fact that the hospital's breach of duty occurred years before the plaintiff could be identified. If feelings of intergenerational responsibility are shared by most people, "current perceptions of justice" may at some point lead to further expansions of the concept of duty to embrace larger and more distant groups of unborn generations.

Developments in the field of preconception tort liability suggest that the concept of legal duty can be freed from the underlying requirement of identifiable individuals. Like the concept of a planetary trust, the nonindividualized conception of duty more closely harmonizes with the kinds of beliefs and commitments that inform our concern for the future. If concepts such as duty and trusteeship can be reformulated in

177. *Id.*

178. *Id.* at 358, 367 N.E.2d at 1255.

nonindividualized terms, perhaps we can achieve an understanding of intergenerational justice that is less at odds with our ideals.

V. CONCLUSION

At the outset, this Comment sought to understand the tensions within an emerging body of law and theory dealing with intergenerational justice. The tensions seem to reflect a discordance between the stated goals of the laws and theories—to implement some norm of intergenerational fairness—and the intellectual frameworks through which the goals are expressed. A review of the current approaches to intergenerational justice shows that a shared concern for the well-being of future generations is typically translated into one of two competing structures, rights theory or cost-benefit analysis. The rights theories rest on a strongly individualistic conception of human nature and, because of this, tend to flounder over the same logical dilemma—how can rights be held by nonexistent entities? Deprived of identifiable beings, the rights approach begins to break down, leading some theorists to deny the possibility of any obligation to the future. In contrast to the rights approach, cost-benefit analysis appears to offer a nonindividualized style of reasoning. As currently utilized, however, cost-benefit analysis shows itself to be a limited and highly manipulable tool. Moreover, by counting only personalized preferences as revealed in hypothetical market transactions, cost-benefit analysis reinforces the same assumptions of acquisitive individualistic human nature that characterize the rights theories.

An alternative approach directs attention away from the individual as the center of analysis. By concentrating on the process of defining the boundaries of morally and legally significant groupings, one may begin to escape the contradictions of the individualized approaches. As illustrated by an expanded concept of duty and the idea of a planetary trust, it is possible to recast forms of legal analysis in nonindividualized terms. If these efforts prove successful, society may achieve a deeper understanding of intergenerational justice, and devise better ways to establish legal protection for succeeding generations.

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