

# Response

## Just(ice) in Time for Future Generations: A Response to Hockett and Herstein

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To whom or what do we have moral obligations? To whom or what *should* we have legal obligations? Is it possible that some recipients, or beneficiaries, of our obligations are not currently existing persons? Might some of them be human beings who are not persons? Or nonhuman animals? Might some recipients of our obligations be persons who do not currently exist but will, or may, exist in the future? If so, what is the basis of the obligations in question? While the conference symposium that included my presentation focused on obligations to future generations, the present discussion will also comment on the cases of human and animal nonpersons. The discussion will draw selectively from the papers by Robert Hockett and Ori J. Herstein.<sup>1</sup>

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<sup>1</sup> Robert Hockett, *Justice in Time*, 77 GEO. WASH. L. REV. 1135 (2009); Ori J. Herstein, *The Identity and (Legal) Rights of Future Generations*, 77 GEO. WASH. L. REV. 1173 (2009). For several reasons my response to Hockett’s paper will be more limited in scope than the reply I offered on the panel. First, to his credit, he has since then eliminated some of the difficulties of the earlier draft to which I drew attention. Second, at the time of this writing, he has furnished only an improved draft, stating that the final paper will be considerably longer. Third, the prob-

### I. *On the Bearers of Moral Status*

To whom or what do we have moral obligations? Equivalently, who or what has moral status? I believe that, despite many strengths, Hockett's position cannot handle this issue adequately. Aware that the issue is highly contested, and not wanting to be unduly restrictive, Hockett in places expresses great openness about the range of beings and entities that may have moral status:

What are the natures or identifying characteristics of these obligors and obligees? Are we speaking of human persons only, or perhaps other creatures or things too? If the latter, must the creatures be rational, "person-like," sentient, or something else? If, say, we mean humans only, do we mean all human beings, or simply rational ones or adult ones, or perhaps merely co-citizens, or rational co-citizens, or human beings as yet further characterized in some other way or ways?<sup>2</sup>

Yet such openness to the possibility of a wide range of beings having moral status appears incompatible with a central thesis of his paper. This thesis concerns those individuals who are to be understood as owing justice to others and those who are to be understood as being owed justice:

In sum, then, I think distributors [those who owe justice] and distributees [those owed justice] are most plausibly conceived as *boundedly responsible agents*, who produce their own satisfactions out of exogenously given material opportunities or resources, which accordingly ought to be distributed equally in keeping with our equal moral worth.<sup>3</sup>

By a "boundedly responsible agent," he means "a being who makes her own welfare, out of material opportunity, subject to both physical and normative constraints."<sup>4</sup> A detailed analysis of this concept is not required here, for it suffices to highlight the idea that such

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lem that chiefly interests me here concerns future generations, and I do not believe his paper squarely addresses that issue—or at least the conceptually thorny, more specific issue known as the "nonidentity problem"—which Herstein's paper addresses head on.

<sup>2</sup> Hockett, *supra* note 1, at 1146. While I think the more common error is to restrict moral status to members of our species, I believe that what Hockett expresses here is *too* open. When the theoretical dust settles, I suggest, views that attribute moral status to the planet, the biosphere, plants, or even nonsentient animals prove very dubious—even if not quite refutable. See DAVID DEGRAZIA, *TAKING ANIMALS SERIOUSLY: MENTAL LIFE AND MORAL STATUS* 226–31 (1996) [hereinafter DEGRAZIA, *TAKING ANIMALS SERIOUSLY*]; DAVID DEGRAZIA, *ANIMAL RIGHTS: A VERY SHORT INTRODUCTION* 18–19 (2002).

<sup>3</sup> Hockett, *supra* note 1, at 1154 (emphasis added).

<sup>4</sup> *Id.* at 1169.

agents are under normative constraints. This idea suggests that Hockett is talking about *moral agents*, beings who are capable of moral reflection and deliberation and are therefore appropriately held to have moral responsibilities.<sup>5</sup> It follows that on his view those who are not moral agents—call them *non-agents*—are not owed justice. It is this aspect of his position that I find particularly problematic.

Hockett's view shares a feature with many traditional moral theories, including contractarianism. The common feature is the assumption that the set of beings with moral responsibilities—moral agents—is precisely the set of beings with moral status. This assumption has a pleasing tidiness about it. It allows the moral community to be easily and unambiguously conceived as one group, for those who bear obligations are just those individuals who benefit from them. At first glance, this picture may seem not only tidier, but also more fair than any alternative insofar as it requires a fundamental sort of moral reciprocity: anyone who benefits from morality also carries its burden. How unfair, it might seem, that some could get a morally free ride: enjoying moral status without having any obligations. Yet a careful examination of our considered moral judgments reveals that we must accept a picture at odds with any such principle of fundamental moral reciprocity.<sup>6</sup>

To begin with human beings whose moral status appears not to be covered by a view like Hockett's, consider ordinary infants and whatever children are too immature to count as moral agents. No one can deny that they are owed justice. They have, for starters, a right not to be abused. Yet they are not moral agents, which is why they are not to be held morally accountable for their deeds. So, even without citing any highly unusual or controversial cases, we can see that there is something wrong with assuming that the recipients of obligations and justice must be capable of providing it.

Confronted with this challenge, defenders of a reciprocity requirement will note that ordinary infants and very young children are beings who (barring an early death) will become moral agents as a result of their natural potential.<sup>7</sup> These thinkers then argue that the

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<sup>5</sup> The term *moral agent* is roughly equivalent, or coextensive, with a prominent sense of the term *person* as it is used by philosophers.

<sup>6</sup> For a more detailed case for this thesis than I can provide here, see DEGRAZIA, *TAKING ANIMALS SERIOUSLY*, *supra* note 2, at 54–56. For a powerful critique of contractarianism along these lines, see MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 93 (2006).

<sup>7</sup> It is typically assumed in this context that the potential relevant to moral status is that stemming from the kind of thing one is: natural potential. *See, e.g.*, Alfonso Gomez-Lobo, *On*

set of beings with moral status, including these very young human beings, is the set of actual or potential moral agents. This move generates two difficulties, however. First, if we cite the natural potential to develop into moral agents as conferring moral status, we must be consistent and note that fetuses, too, have this potential. A human fetus is a being that, if permitted to live, will normally develop into an infant, then a child, an adolescent, and so on. Stated technically, a human fetus is *numerically identical* to—is one and the same individual as—the later person she may become. Conversely, each of us was once a fetus.<sup>8</sup>

Although I said that this point reflects a difficulty with the view under consideration, it really presents a problem only for those who hold such a view and deny that fetuses have moral status and are owed justice. Then again, for whatever it's worth, it appears that most moral and legal philosophers do deny this latter claim. If they are right to do so, it cannot be simply an infant's natural potential for moral agency that confers its moral status. But perhaps that potential in combination with other factors could be invoked in a cogent defense of the view that postnatal human beings, but not human fetuses, have moral status.<sup>9</sup>

In any case, a second difficulty with the appeal to natural potential remains. This is the frequently noted “problem of non-paradigm humans,” which concerns those human beings who—whether due to genetic anomaly or environmental insult—lack the potential to de-

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*Potentiality and Respect for Embryos: A Reply to Mary Mahowald*, 26 THEORETICAL MED. & BIOETHICS 105, 106–09 (2005). Thus, a normal human infant, by virtue of its kind, has the potential to become a moral agent. By this reasoning, the “potential” of a monkey to be genetically enhanced such that she acquires much greater cognitive abilities than monkeys can naturally have—an instance of artificial potential—is irrelevant to moral status. Moreover, at least as I understand natural potential, a cognitively abnormal human being who cannot develop into a moral agent lacks the natural potential to be a moral agent.

<sup>8</sup> The most influential work in the personal identity literature to insist on this point, while asserting its consistency with educated common sense, is Eric Olson's *The Human Animal*. ERIC T. OLSON, *THE HUMAN ANIMAL: PERSONAL IDENTITY WITHOUT PSYCHOLOGY* (1997). It has hardly been free of challenges, however. To my mind, the strongest challenge has been presented in Jeff McMahan's *The Ethics of Killing*. JEFF MCMAHAN, *THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE* 3–94 (2002). McMahan argues, in contrast to Olson, that we are most fundamentally, or essentially, not human animals but embodied minds—that is, embodied beings with the capacity for conscious experience. *Id.* I have criticized McMahan's approach and defend something closer to Olson's. See David DeGrazia, *Identity, Killing, and the Boundaries of Our Existence*, 31 PHIL. & PUB. AFF. 413, 417–25 (2003); DAVID DEGRAZIA, *HUMAN IDENTITY AND BIOETHICS* 11–76 (2005).

<sup>9</sup> Considering that the law generally treats postnatal human beings, but not fetuses, as *persons*—in the sense of bearers of legal rights—a defender of legal tradition might very well hope for such a cogent defense.

velop into moral agents. If moral status depends on moral agency, whether actual or potential, these cognitively profoundly disabled individuals lack moral status. Yet it seems incredible to suggest that they lack a right not to be abused. Their lack of moral agency notwithstanding, surely they have the same basic moral status that you and I have.<sup>10</sup> Surely we have an obligation to them (not merely to concerned others) not to use these human beings as mere instruments or resources for those who are more fortunate.

Hockett's view, therefore, does not seem to do full justice to human beings. I contend further, though more controversially, that it does not do justice to nonhuman animals. My claim here depends on the thesis that sentient animals—that is, animals capable of having feelings<sup>11</sup>—have moral status. This thesis is far more contested today than, say, the claim that human infants have moral status. Nevertheless, more and more people are coming to recognize the moral status of (sentient) animals.<sup>12</sup> Perhaps it will suffice here to sketch a single argument, which focuses on the wrongness of cruelty.

Imagine an exceptionally cruel treatment of some animal whose sentience is not seriously in doubt. Imagine, for example, a practice of brutally and continually kicking cats for no reason other than whim or “sport.” Any morally serious (or even psychologically healthy) person will judge that such behavior is wrong. But why is it wrong? It cannot be wrong only because the cat is someone's “property” because, if the cat is a stray, the action seems just as obviously wrong.<sup>13</sup> Nor can such cruelty be wrong merely because it upsets those who care about animals, for we will maintain the judgment of wrongness even if it is stipulated that no animal lovers will learn of the cat-kicking. Might it be wrong because it makes one who kicks cats more

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<sup>10</sup> For a particularly strong discussion of this idea, see NUSSBAUM, *supra* note 6, at 96–223.

<sup>11</sup> Under the rubric of “feelings” I include sensations, emotions, and moods. It is sufficient to have any of these to qualify as sentient. Thus, any animal capable of experiencing pain is sentient.

<sup>12</sup> See generally THE ANIMAL ETHICS READER (Susan J. Armstrong & Richard G. Botzler eds., 2003).

<sup>13</sup> For the record, I deny that any beings with moral status—including sentient animals—can *rightly* be regarded as property, from which denial it follows that much current law regarding animals is unjustified. For detailed arguments to this conclusion, see Gary L. Francione, *Animals—Property or Persons*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 108–42 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). It is perhaps worth noting here that The George Washington University Law School, which hosted the above-mentioned symposium, has an Animal Law Program. See The George Washington University Law School, Animal Law, <http://www.law.gwu.edu/careers/Publicinterest/AnimalLaw/Pages/AnimalLaw.aspx> (last visited July 8, 2009).

likely to abuse human beings? At most, that might be part of the story. Even if we had strong empirical grounds for holding that abusing animals makes one more likely to abuse humans, we could imagine further evidence that could arrive and overturn this psychological thesis—without any effect on our conviction that the cruelty in question is wrong. Our judgment of wrongness is phenomenologically independent of empirical assumptions about spillover effects on human beings. Relatedly, what seems most obviously wrong about the cruelty is *what it does to its victim*. So at least part of what makes such imagined cat-kicking wrong is that it harms the cat for no compelling reason and, in that way, wrongs the cats (even though, presumably, cats have no more understanding of right and wrong than human infants do). In conclusion, *any plausible account of the wrongness of cruelty must acknowledge the moral status of its victims*. This entails that sentient animals, all of whom can be victims of cruelty, have moral status.<sup>14</sup>

Therefore, despite my very considerable admiration for the position Hockett has developed, I find that it does not adequately account for our obligations to those beings who are not, and cannot develop into, moral agents. We might regard his position as a partial account of justice—one that addresses moral agents only. Taken thus, it is considerably more attractive. Whether it is possible to extend such an account so as to do justice to those who are not even potentially moral agents is a question I leave open.<sup>15</sup>

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<sup>14</sup> Whether they have the same moral status as all other beings who have moral status is another question.

<sup>15</sup> One possible extension would follow up on a discussion presented by T.M. Scanlon in his defense of a version of contract theory. T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 177–87 (1998). Scanlon holds that morality is primarily a matter of what moral agents owe one another and that rightness is a function of what we can justify to one another. *Id.* at 177–79. Justification is to be understood in terms of principles that no one could reasonably reject. *Id.* at 183. Scanlon notes the possibility that animals could have “trustees” among moral agents who insist on principles that protect animals. *Id.* at 182–83. (This point also applies to nonparadigm humans. It could also cover cases where cruelty to animals goes undiscovered by animal lovers because the relevant principle would be violated regardless of who knows about the violation.)

My first reaction is to applaud Scanlon for approaching this issue with far more seriousness than have most in the contract tradition. However, I would say that any such view organized around the idea of contracts, agreement among equals, or moral agents’ obligations to each other will be adequate only if sentient animals are understood as having moral status in the sense that *they* can be wronged. On Scanlon’s view, this is possible only if the set of principles to which moral agents would agree—or from which no one could reasonably disagree—would include principles that regard animals in this way. *See id.* at 186.

But then Scanlon and like-minded thinkers, including Hockett, face a dilemma. Either hypothetical moral agents are to be imagined as accepting such animal-protecting principles or they are not. If they are not, then they fail the test mentioned above of explaining the wrongness of

## II. *Do We Have Obligations to Future Generations?*

### A. *Introduction*

Our society has begun to take global warming seriously. I accept the judgment of leading scientists that, if we do not take effective action to stem the growth of global temperatures, there will be devastating consequences for humans, other animals, and the environment in the decades to come. (My acceptance of this judgment will be an assumption for the remainder of this discussion.) It therefore seems breathtakingly obvious that we have a moral obligation to take such effective action.

But explaining the basis for such an obligation proves tricky for reasons connected with the present nonexistence and uncertain identity of future individuals who will be affected by the moral choices we make today. Admittedly, in the case of global warming, many of the people to be affected by our present decisions do exist today and therefore have definite identities; they will still be alive when some of the effects of our present decisions are felt. To some extent, then, the problem of global warming does not represent the conceptual challenges and paradoxes confronting much deliberation about future generations. At the same time, it seems obvious that we have obligations to be good stewards of the earth not only for the sake of presently existing individuals, but also for those who will later come to exist.

In all likelihood, no person who is alive today will be alive in 200 years. Yet 200 years from now, there will be people who are affected by our present choices. They will have the same moral status and basic rights as we have. They deserve, it seems, to inherit a world in reasonably good condition. If we fail to do what we reasonably can to stem global warming, it would seem that those who are alive in 200 years will have reason to blame us for our negligence. Surely we owe it to future generations—not just those presently existing individuals who will still be alive at some relevant time in the future—to be re-

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cruelty by conferring moral status on its victims. If they are imagined to accept such strong animal-protecting principles, then that must be because *granting animals moral status is not something one could reasonably reject*. But how could that be true unless animals really are worthy of moral status? Assuming they are, doesn't that suggest that contractarianism and similar views are on the wrong track? If sentient animals are creatures whose moral status it is unreasonable to deny, despite the fact that they are not moral agents—and harming them gratuitously is the most obvious wrong we can do them (as it surely is)—then this hints that nonmaleficence is more morally fundamental than contracts, moral agreements, and the like. I suggest we take the hint.

sponsible stewards of the planet. As we will see, making conceptual sense of this judgment proves challenging.

One way to consider the challenge is in terms of moral status. In the previous section, it was argued that all sentient humans and nonhumans have moral status or (to use the term more commonly employed by legal scholars) rights. What about future generations: do they have moral status? One might regard the answer as obvious: “They are persons, aren’t they? If all sentient beings have moral status, then *a fortiori* so do all persons.” Fair enough—except perhaps for two things. First, one might challenge the tense of the claim that future persons *are* persons. Second, as we will see, most of the people who will exist in the future will depend for their existence on the actions and policies we adopt in the present, generating a paradox known as the nonidentity problem.

*B. Does the (Present) Nonexistence of Future Individuals Matter?*

According to Herstein, the present nonexistence of future people presents a significant challenge to our efforts to make sense of our obligations to future generations: “Future people are not individuals as they have no personal identity; ‘they’ do not yet exist and who ‘they’ will turn out to be is in most cases indeterminate.”<sup>16</sup> But is it true that future persons don’t exist and have indeterminate identities?

It may seem obvious that future persons don’t exist, if we emphasize the present tense of the verb. But suppose we take the four-dimensional perspective developed by Einstein and embraced by many physicists.<sup>17</sup> From this perspective, time is not fundamentally different in kind from the three dimensions of space that we perceive; rather, the four dimensions are part of a web-like continuum of space-time. If we think in these terms, we may judge that future individuals *do* exist, even if not “now,” but seem inaccessible to us (who perceive space and time as fundamentally different) because they exist in remote regions of space-time. That future persons do not exist is, from this standpoint, an illusion produced by our limited perceptual faculties.<sup>18</sup>

For all I know, the four-dimensional perspective is correct, and we may accordingly regard future individuals as existent. Then again,

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<sup>16</sup> Herstein, *supra* note 1, at 1181.

<sup>17</sup> See generally ALBERT EINSTEIN, *RELATIVITY: THE SPECIAL AND GENERAL THEORY* (1920).

<sup>18</sup> In response to my comments at the symposium, Herstein considers this possibility. See Herstein, *supra* note 1, at 1182 n.14.

for all I know, it is incorrect. There are contemporary models of physics that challenge the thorough causal determinacy implicit in this perspective or challenge the ideas that there are just four dimensions and that time is not fundamentally different from space. (Quantum mechanics and string theory provide resources for such challenges.) Perhaps more importantly, the idea of the future as existing in the same way that the present exists is so foreign to our ordinary perceptions and reasoning that it is virtually impossible to embrace this idea in practical reasoning.

Whether or not the future is determinate, such that who will exist is already metaphysically settled, basic facts of our epistemic and practical predicament remain solidly in place: we cannot predict the future in very much detail and are uncertain about who will come into existence; we feel irresistibly that we face important choices (consistent with the sense of free will); and, if we are wise, we appreciate that the choices we make will have a significant bearing on who comes into being. Thus, appeals to a four-dimensional perspective, even if possibly correct, are far from satisfying.

For the remainder of this discussion, then, I will assume that future individuals do not exist and that their identity—that is, who they will be—is presently indeterminate. My question is whether this matters.

Herstein certainly thinks so:

That at no present point in time are there any particular *future* individuals to concern ourselves with (because “they” are indeterminate and nonexistent) entails that our concern for future generations cannot be understood as a concern with future individuals. If it were, it would necessitate that our concern for future generations is concern for nothing at all.<sup>19</sup>

This reasoning involves a non sequitur. Why must our present moral concern be restricted to presently existing individuals? *There will be people—who, as people, will have moral status and rights—in the future.* It is with them that we can be concerned. Even though our knowledge of the future is limited, we do know (or can only responsibly assume) that there will be people in the future who will be affected by our choices. Arguably, this is sufficient for grounding certain obligations.

Someone thinking along the lines of Herstein may answer, “Well, who are these future persons?” stressing their indeterminate iden-

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<sup>19</sup> Herstein, *supra* note 1, at 1181–82.

tity.<sup>20</sup> My answer is that they are whoever will, in fact, exist (even if this fact isn't yet determined). To assume that these people's present nonexistence and indeterminate identities block the force of our moral obligations to future generations is tantamount to making two specific assumptions. First, it is to assume the correlativity of rights and obligations directed to particular individuals: *A* (a moral agent) has an obligation to *B* (some individual) if and only if *B* has a right against *A*. I accept this assumption.<sup>21</sup> But Herstein's reasoning also apparently implicates a second assumption: *A now has an obligation to B if and only if B now has a right against A*. If this *temporally bound* correlativity thesis is correct, then the current nonexistence of individuals in future generations would preclude our now having obligations to them—for, not currently existing, these individuals do not currently have rights against us. But the temporally bound correlativity thesis is not self-evidently true, and I see no compelling reason to accept it.

Indeed, I believe we should reject the latter thesis. When future people come into being, they will have rights—the rights of future generations will *vest* in them—and that, I suggest, is enough of a basis (at least at first glance) on which to ground obligations to future generations. Our present obligations are to them, whoever they will be. Although here I have only suggested, rather than argued for, rejecting the temporally bound correlativity thesis, the main point is that we have found no reason to accept this thesis, on which Herstein's reasoning depends.

Perhaps more should be said, however. Perhaps, due to future people's present indeterminacy, we need to make reference to *types* or *classes* of future people—such as those people who will live in the 22nd century—or, since types are dubious bearers of moral status and

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<sup>20</sup> Introducing the concept of personal identity in the text, Herstein cites seminal works by John Perry, Robert Nozick, and Derek Parfit along with an anthology. Herstein, *supra* note 1, at 1181 n.11 (citing ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 27–70 (1981); DEREK PARFIT, *REASONS AND PERSONS* (1984); *PERSONAL IDENTITY* (Raymond Martin & John Barresi eds., 2003); *PERSONAL IDENTITY* (John Perry ed., 1975)). Except for the anthology, the most recent of these works is Parfit's *Reasons and Persons*. PARFIT, *supra*. The neglect of recent literature matters because the discussion has changed importantly in the last fifteen years. See generally, e.g., LYNNE RUDDER BAKER, *PERSONS AND BODIES: A CONSTITUTIONAL VIEW* (2000); McMAHAN, *supra* note 8; OLSON, *supra* note 8; MARYA SCHECHTMAN, *THE CONSTITUTION OF SELVES* (1996). For a good, up-to-date introduction, see generally DAVID SHOEMAKER, *PERSONAL IDENTITY AND ETHICS* (2009).

<sup>21</sup> I do not, however, accept a principle of correlativity between rights and obligations *in general*. We may have some obligations that do not correlate with particular individuals' rights. This point proves important towards the end of the paper.

rights, *tokens* of types. Herstein does an admirable job of exploring the issues with respect to types,<sup>22</sup> but I will not pursue the matter here. Seeing no reason to accept the temporally bounded correlativity claim, I rest content with the thought that any types of future people with whom we are concerned will later be instantiated by real individuals. Their rights, I assume, will correspond to any obligations we have to these individuals.

### C. A More Formidable Challenge: The Nonidentity Problem

#### 1. The Problem

When future people come into being, they will have rights and moral status. Their basic rights will be the same as you and I have. But will their rights include any that actually correlate with our current obligations (assuming we have some) to future generations? The issue we now confront is not whether future people will have rights; nor is it whether in principle some of our present obligations can correlate with certain rights of future people. It is unproblematic, for example, that they will have a right not to inherit—as a result of our negligence—a world so compromised that life will predictably be quite miserable and not worth living. If we are so negligent and leave such an awful world, then those who inherit it and consequently have lives not worth living will have a legitimate complaint against us for violating their rights: better not to have been brought into existence at all than to have been brought into existence in such miserable conditions.<sup>23</sup> What proves difficult to make sense of and justify is the thesis that we have obligations not to be negligent in such a way that predict-

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<sup>22</sup> Despite my general admiration for his discussion, I find Herstein's remarks about personal identity in criticizing Reiman's appeal to types significantly confused. He criticizes Reiman for holding that there is something involved in one's identity beyond one's properties and, more specifically, for asserting that even two twins who were qualitatively identical would be numerically distinct individuals. Herstein, *supra* note 1, at 1195 (citing Jeffrey Reiman, *Being Fair to Future People: The Non-Identity Problem in the Original Position*, 35 PHIL. & PUB. AFF. 69, 83 (2007)). But Reiman is correct. Two human beings, or any two objects—if they are really two—are numerically distinct, even if their qualities perfectly coincide. (The point about irreducible distinctness was advanced by medieval philosopher Duns Scotus, who spoke of a necessarily distinguishing quality that he called *haecceity* or “this-ness.” See THE CAMBRIDGE COMPANION TO DUNS SCOTUS 119 (Thomas Williams ed., 2003).) Of course, some “extrinsic qualities” would have to differ just to permit us to count the entities as two distinct individuals. For example, they would be in different places and would have different historical paths through space-time. But the difference between qualitative similarity (or “identity” in the sense of identicalness) and numerical identity is absolutely fundamental to discussions of personal identity, as the authors Herstein cites as making seminal contributions all make clear. See *supra* note 20.

<sup>23</sup> Such extreme cases are referred to as *wrongful life* cases.

ably makes life for future persons less good than it might have been—with little sacrifice on our part—but still worth living.

Consider an irresponsible environmental or resource-related policy decision made today (use your imagination to fill in details) with full awareness that it will require people in the distant future to abandon, say, the islands of Hawaii. There will be plenty of time for people to move and, with adequate precautions, everyone will be safe. But many will be inconvenienced, the expenditure required for the transition will be significant, and lots of people will be saddened by the need to move and lay down roots elsewhere—as well as resentful that people today were unwilling to forgo some minor short-term interests in an effort to keep Hawaii habitable. In this thought experiment it is stipulated that, predictably, many people who do not exist today will come into being and will be significantly inconvenienced, but it is also assumed that their lives will not be rendered unbearable, or not worth living, as a consequence. They will be happy to be alive despite the sacrifices forced upon them.

Consider now the responsible alternative. We accept the costs of, say, using public funds to create certain offices and jobs on the islands with the intention of implementing a responsible policy, so no one later has to move from Hawaii. Surely that is the right course of action. But why it is right—indeed, how it can be right—is not easy to explain due to the *nonidentity* between the people who will exist in the distant future if we take the responsible course and those who will exist if we do not.<sup>24</sup>

Different policy choices will result over time in different people. Inasmuch as the responsible course requires creating, say, 100 new jobs, this choice will immediately affect the daily lives of 100 people and their families or others with whom they are in close contact: it will affect where they go, whom they will see during the day, and perhaps where they and their families live. Insofar as new office spaces are required, the responsible course of action will affect the lives of people involved in supplying the needed materials and people who build the new places to work; some of these people will meet and interact with different people than they otherwise would have met and interacted with. These factors will, for many people, ultimately affect with

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<sup>24</sup> Although the issue here involves numerical identity—being one and the same individual—we are not concerned with identity over time, as is most of the philosophical literature on identity, but rather with *transworld* identity—being one and the same individual in different “possible worlds” (or possible states of the world). In cases in which someone exists in one possible world but not in another possible world, we have a case of transworld nonidentity.

whom they procreate, which will determine who comes into the next generation—as well as all their progeny. After several generations of such ripple effects stemming from the policy decision, a great number of people will exist who would not have existed at that time had the original policy direction been different. The staggering effects of present, everyday decisions for who will exist in the intermediate or distant future raise a major philosophical hurdle for our efforts to understand obligations to future generations.

To see this, consider again the hypothetical situation in which we choose not to act responsibly today so that, down the temporal road, quite a few people are required to bear some expense and inconvenience and depart a land they love. Learning about our earlier negligence, they may feel inclined to complain about it. But, given the ripple effects of the policy choice and the number of intervening years, it is apparent to anyone who examines the facts that those presently burdened individuals *would not have existed had we earlier taken the presumably responsible course of action*. And they are happy to be alive. So who are they to complain?

Conversely, how can it be said that we have *harmed* them? We made it possible for them to have worthwhile (though hardly unburdened) lives. Surely it cannot be worse for them to have worthwhile (if somewhat burdened) lives than not to exist at all!<sup>25</sup> If they are not worse off for our decision, how can it have harmed them? Or, if it's acknowledged that our decision did not harm them, how can it have *wronged* them? Did it violate their rights? What right of theirs could it have violated? If one answers “the right to be left a better environment,” couldn't we fairly reply that the people in question would gladly waive any such right, the honoring of which would have prevented their worthwhile existence, thereby implying that they were not wronged? But if they were not wronged, then because it seems no

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<sup>25</sup> Note that I am not advancing the problematic claim that coming into existence is itself a benefit. This claim is problematic because it is doubtful that there is a real individual who could be the beneficiary. What individual, who does not exist, could then come into existence and be thereby benefited? Some might find it natural to answer “a potential person.” But, first, I submit that “potential people” aren't real things; rather, speaking of “potential people” is really to speak of possible future states of the world in which people come into being. Second, if I am mistaken and there are potential people who benefit from coming into being, then we must be imposing a major loss on an awful lot of these beings by declining to procreate more than we do. I find this hard to believe. Returning to the text, what I am claiming is a negative thesis: it cannot be correct that having a worthwhile life is *worse than* never existing. After all, not existing is not a state against which an existence with a particular quality of life can be compared. How to make sense of our judgments about wrongful life cases is addressed below. See *infra* note 29.

one else has a better claim of having been wronged, how could the original decision not to take the seemingly responsible course have *been* wrong? How can an action that wrongs no one be wrong? This is the nonidentity problem in the context of future generations.<sup>26</sup>

## 2. *Some Strategies for Addressing the Problem*

In considering strategies for dealing with this puzzle, it will be instructive to focus initially on the conception(s) of harm assumed in the reasoning just presented. The reasoning assumes that one is harmed only if one is made *worse off* than one (1) otherwise would have been (the *counterfactual* conception of harm) or (2) was beforehand (the *diachronic* conception).<sup>27</sup> In nonidentity cases, the alleged victims are not worse off as a result of the earlier decisions because any different course would have deprived them of worthwhile lives. But several scholars, including Herstein, have challenged conceptions of harm that compare how well-off one is as a result of some action to how well-off one otherwise would have been or, in cases in which one already existed, how well-off one was in the status quo ante.<sup>28</sup>

Any conception of harm must compare the state of the victim as a result of the harm to some baseline. In ordinary cases, both the counterfactual and the diachronic conceptions apply and converge. Suppose I am happily standing on the top of a building when you sneak up and push me over the edge, causing me to fall to my death. Here the baseline against which my falling to my death is compared is my being alive, and happy, atop the building—as I would have been had you not pushed me and as I was before your intervention. In nonidentity cases, the person who is brought into existence in a compromised state would not have existed if the seemingly irresponsible action was not taken, and, of course, she did not exist as part of the status quo ante.

Although nonexistence is not really a state of an individual, we can make the point in terms of *states of affairs*: we compare that in

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<sup>26</sup> Another significant context for the nonidentity problem is reproductive decisionmaking in which parents predictably bring into existence children with certain disabilities when it would have been relatively easy to bring different children, without the disabilities, into existence. I address this issue, however incompletely, in *Human Identity and Bioethics*. DEGRAZIA, *supra* note 8, at 268–79.

<sup>27</sup> For a good discussion of these and other conceptions of harm, see Lukas Meyer, *Intergenerational Justice*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3.1–2 (Edward N. Zalta ed., 2008), <http://plato.stanford.edu/archives/spr2008/entries/justice-intergenerational>.

<sup>28</sup> See generally, e.g., Meyer, *supra* note 27 (canvassing several alternatives to these standard conceptions of harm).

which the individual comes into being in a compromised state against that in which the individual does not come into being. The claim is that one cannot be worse off if one is the individual in the first state of affairs than if the second state of affairs obtains. That is, one can't be worse off in state *X* than in state *Y* if one cannot be in *Y*. Therefore, so long as harm is construed in the standard diachronic or counterfactual terms, one is not harmed by coming into being in a compromised condition or in a compromised world.<sup>29</sup>

As Herstein notes, however, the nonidentity problem can be addressed by defending an alternative conception of harm according to which one *is* harmed in such cases even though one would not have existed had a different course of action been taken.<sup>30</sup> A prominent alternative understands harm by comparison with a different baseline than how well-off one would have been or how well-off one was: a *threshold of health or well-being* such that, if one's situation is caused to land below the threshold, one is per se harmed.<sup>31</sup> Because the threshold serves as a norm, we may call this a *normative* conception of harm.

As Herstein demonstrates in some detail, the effort to establish a threshold that yields intuitively plausible results across a wide range of cases faces considerable difficulties.<sup>32</sup> For example, an action that causes someone who is initially far below the threshold to improve her lot, yet not so much as to reach the threshold, would count as a harm—whereas it should count as a benefit.<sup>33</sup> To be sure, this difficulty is not shared by approaches that do not specify a threshold for the purposes of identifying harm but rather appeal to the causing of particular conditions. For example: “An action harms a person if the action causes pain, early death, bodily damage, or deformity to her,

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<sup>29</sup> How then to make sense of our judgments about wrongful life cases, in which one is brought into being with a life that is predictably not worth living? The nonidentity problem, after all, was set up such that it excluded such cases. Why should it exclude them if one can't be harmed by being brought into existence—even a miserable existence? The best answer, I think, is that in wrongful life cases one is predictably brought into an existence that is *noncomparatively bad*, inherently bad for the subject (because the good things in the life do not compensate for the bad things), not bad by comparison to some other state in which he could have been. See Jeff McMahan, *Wrongful Life: Paradoxes in the Morality of Causing People to Exist*, in *RATIONAL COMMITMENT AND SOCIAL JUSTICE: ESSAYS FOR GREGORY KAVKA* 208, 215 (Jules L. Coleman & Christopher W. Morris eds., 1998). If we take this approach, we may say either that the individual in a wrongful life case was wronged without being harmed, or that she was harmed in accordance with some alternative conception of harm (as explained next in the text).

<sup>30</sup> Herstein, *supra* note 1, at 1207.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 1207–10.

<sup>33</sup> *Id.* at 1209.

even if she would not have existed if the action had not been performed.”<sup>34</sup> As we will now see, however, this and similar approaches face another substantial challenge.

The problem confronts any view that construes the wrong in non-identity cases as involving harm to particular victims. Such approaches appear to lack a cogent account of why an action in a nonidentity case that is alleged to harm the individual who results should not be performed *even when it brings about compensating benefits to that individual*.<sup>35</sup> Suppose we agreed that bringing someone into existence in a compromised state (due to negligence, say) counted as harming her even if her life is worth living. In that case, assuming that needlessly causing harm is wrong, this would suggest that every act of procreation is wrong, because (1) everyone who is born will experience certain harms, and (2) people have the option of not procreating at all.<sup>36</sup> In contrast to such reasoning, most of us believe that although bringing someone into the world inevitably imposes certain harms on her,<sup>37</sup> in ordinary cases where parenthood is entered into responsibly, the child will enjoy benefits that more than compensate for the harms. If that makes sense in ordinary cases of responsible procreation, it would seem to make sense in any case where a child will predictably have a life worth living: the benefits more than make up for the harm. In these cases, there is harm but, as in the case of responsible surgery, expected benefits justify the harm. This recognition, as far as I can see, plagues any effort to base a claim of wrongness in nonidentity cases on the attribution of harm—construed normatively—to the people to be.

Another strategy directs our attention away from harm and towards *rights*. If a member of a racial minority is denied a ticket at an airport for racist reasons, and the flight he wanted to take crashes so that he was fortunate not to have been aboard, it is nevertheless clear that he has been wronged through a rights violation.<sup>38</sup> Similarly, one

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<sup>34</sup> Elizabeth Harman, *Can We Harm and Benefit in Creating?*, 18 *PHIL. PERSP.* 89, 93 (2004).

<sup>35</sup> See McMahan, *supra* note 29, at 223.

<sup>36</sup> David Benatar does, in fact, reach the striking conclusion that procreation in general is wrong. DAVID BENATAR, *BETTER NEVER TO HAVE BEEN: THE HARM OF COMING INTO EXISTENCE* 2 (2006). Suffice it to say here that I disagree.

<sup>37</sup> Importantly, we can grant this even if we reject the normative conception of harm and, with it, the thesis that being brought into the world in certain disadvantaged conditions is itself harmful. For we can all agree that bringing someone into existence guarantees that she will come to undergo at least some harm. The supporting idea, which all can accept, is that no human life can entirely escape harm.

<sup>38</sup> This is one of several examples presented in James Woodward, *The Non-Identity Prob-*

might argue, in the sorts of nonidentity cases under consideration, present irresponsibility wrongs those future people who inherit a compromised environment because our choices violate their rights. But what right has been violated? Is it a right to be brought into existence in an environment that has not been compromised through negligence? But no one has a right to be brought into existence in the first place. The right to responsible stewardship of the environment? But, if the corresponding obligation had been met, one would not have existed with a worthwhile life, so one would rationally waive this right. Perhaps instead a conditional right would make sense: one has a right such that, *if* one is brought into existence, *then* it will be in an environment that hasn't been negligently compromised. But it is impossible to fulfill this right of a given individual in nonidentity cases except by not bringing him into existence. Because that option isn't preferable, the individual seems to have no rights-based ground for complaint.

A person may have another basis for complaint, however. He might complain that the earlier generation's negligence was hardly motivated by a desire to ensure the existence of those who eventually did come to exist; in fact, it wasn't motivated by any goodwill to anyone. It was just negligence stemming from an indifference to the people of the future. There is therefore a clear *virtue-based* ground for criticizing the negligence. But many commentators seek more than a ground for criticism: namely, a ground for complaint on the part of the future generations.<sup>39</sup> To be sure, members of future generations can complain that the indifference of the earlier generations was morally objectionable. But it has yet to be shown that they can complain that they *as individuals* were wronged.

Perhaps in the cases under consideration individuals can claim to have been wronged not as individuals but *qua members of future generations*.<sup>40</sup> That is, they might argue that the persons guilty of earlier

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lem, 96 ETHICS 804, 811 (1986). This example is discussed by Herstein. See Herstein, *supra* note 1, at 1212–14.

<sup>39</sup> See, e.g., Harman, *supra* note 34.

<sup>40</sup> Cf. Rahul Kumar, *Who Can Be Wronged?*, 31 PHIL. & PUB. AFF. 99, 100 (2003) (contending that the “fixity of psycho-physical personal identity” is morally irrelevant to the question of whether a person has been harmed); Jeffrey Reiman, *Being Fair to Future People: The Non-Identity Problem in the Original Position*, 35 PHIL. & PUB. AFF. 69, 85 (2007) (arguing that we must “think of the interests of future people as interests of people considered as if which particular individuals they are is irrelevant.”). Reiman’s argument, which appeals to John Rawls’s original position thought experiment, seems to me to be vitiated by the following consideration: contractors in the original position, despite not knowing what characteristics they will have or even what generation they will be in, do know that they will come to exist. Such certainty of future existence is precisely what is lacking in nonidentity cases. Therefore, the terms of justice

negligence did not care sufficiently for *whoever* would come into existence in future generations. The people who actually came into being are members of this class—future generations—and as such inherited a compromised environment, constituting a wrong against them. This is an attractive characterization of the moral situation. But it may not dissipate the air of paradox. If we ask what the wrong done to these people consists in, one must presumably point to the compromise of the environment. And why is that bad? *Presumably, because it is harmful.* But we are clear that the individuals in question have not been harmed (or at least, in view of attendant benefits, not wrongfully harmed). Yes, the earlier people's actions were irresponsible and for that reason morally wrong.<sup>41</sup> But it's not merely their attitude of indifference that seems wrong; it is *their willingness to cause future harm.* Further, it seems that in some sense they did cause harm. What we haven't made sense of, thus far, is the idea of predictably and culpably causing harm when no individual can claim to have been harmed (or at least wrongfully harmed). Can there be harm without a victim of harm?

### 3. *An Alternative Approach*

We have found that certain strategies for addressing the nonidentity problem in the context of future generations have been partially successful. They have explained, to some extent, how the people of future generations can be wronged in such cases. For they, as members of a broad class (future generations), were the recipients of culpable indifference and negligence. But this seems insufficient inasmuch as the negligence seems to be wrongful in some way tied to harm. I would go further and claim that in some sense actual, wrongful harm must have been done—even though no particular individual was harmed (or wrongfully harmed). This suggests the odd notion of victimless harm. If this line of reasoning is correct, then the negligence of the earlier people is wrong both because it is culpably indifferent—a wrong in terms of expressed character and negligent action that arguably wrongs the members of future generations—and because it causes harm.

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at which contractors would arrive cannot be assumed to illuminate the ethics of nonidentity cases.

<sup>41</sup> It is worth pausing to emphasize that we now have a cogent explanation for the judgment that they acted wrongly. We can also explain some appropriate grounds for resentment on the part of the members of future generations: in short, the earlier people didn't give a damn about future generations.

In my view, the irresponsible actions cause harm not to particular individuals, but impersonally.<sup>42</sup> Here I take a cue from Parfit, who first introduced the nonidentity problem. Parfit contends that the part of morality concerned with benefit and harm—which he calls simply “beneficence”—needs radical overhaul. Parfit argues that we should understand this part of morality not in *person-affecting terms*—that is, in terms of effects on particular determinate individuals—but in the *impersonal* terms of how much benefit and harm an action brings into the world.<sup>43</sup>

Rather than construing all of beneficence in impersonal terms, as Parfit suggests, we might construe beneficence in both impersonal and individual-affecting terms. We might, more specifically, think of beneficence in individual-affecting terms when such terms apply—that is, when particular individuals are affected by our actions. But, in cases of nonidentity, we should think in impersonal terms—namely, in terms of making the world better or worse overall than it otherwise would or could have been. Accordingly, in these cases, we employ a concept of *impersonal harm*: the bringing about of states of affairs that are worse than we could have brought about, even though no particular individual is made worse off.<sup>44</sup> One need not assume that all impersonal harming is wrong, as an act-utilitarian seems required to judge. What is wrong, or at least prima facie wrong, is causing impersonal harm when one can avoid it without undue cost to oneself or others.<sup>45</sup> This captures the harm-related wrong of negligently compromising the environment to the detriment of future generations.

I do not claim that this mixed approach combining individual-affecting and impersonal considerations in understanding beneficence is free of difficulties. Rather, I suggest that it is promising. Further, I suggest that this approach must be part of an adequate response to the nonidentity problem. Otherwise, we do not account sufficiently for

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<sup>42</sup> Although this proposal is not original to me, it is one that Herstein does not address in his paper.

<sup>43</sup> See PARFIT, *supra* note 20, at 393–405. Because sentient animals, who are not persons, can be benefited and harmed, and because we come into existence before we are persons, I will substitute for *person-affecting* the term *individual-affecting*.

<sup>44</sup> See also JONATHAN GLOVER, CHOOSING CHILDREN: GENES, DISABILITY, AND DESIGN 45–47 (2006) (describing impersonal harm as that which occurs when “the fact that the world has been made a worse place [is] the only objection to what has been done”).

<sup>45</sup> See also ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS & JUSTICE 226 (2000) (defending a principle requiring one to prevent a child under one’s care from suffering a serious harm, disability, or loss whenever it can be avoided “without imposing substantial burdens or costs or loss of benefits”).

the persistent sense that nonidentity cases somehow involve wrongful harm.

### *III. Concluding Reflections*

If we focus on the conclusions of this paper's two major sections, we see that a common theme emerges. The chief difficulty in Hockett's discussion was a failure to deal adequately with the moral status of sentient beings—both human and nonhuman—who lack the capacities that constitute moral agency. I argued that any approach to morality that incorporates a principle of fundamental moral reciprocity—according to which only those who bear the burdens of moral responsibility enjoy the benefits of moral status—is inadequate, notwithstanding the distinguished historical pedigree of such approaches. In particular, I argued that such views, which include but are not limited to contract theory in all its varieties, cannot account adequately for some of our obligations to sentient animals and nonparadigm (or even just very immature) human beings.

My discussion focused on a single example: the obligation not to treat sentient beings cruelly. Any adequate approach to morality will be able to account plausibly for this obligation and will, accordingly, grant moral status to all sentient beings. The moral tradition that most straightforwardly assigns moral status to sentient beings is utilitarianism. This tradition has always appreciated that everyone who can be harmed or benefited matters morally.<sup>46</sup> Deontologists, focusing on respect (and commonly believing that nonhuman animals do not merit respect), have struggled to do justice to sentient creatures whose capacities fall short of personhood. Consequently, as more fully appreciated in recent years, mainstream deontological theories struggle to account adequately for the moral status of nonparadigm human beings.<sup>47</sup>

If we take seriously the moral status of all individuals who possess it, we will, among other things, refrain from harming them unnecessarily. But in our discussion of future generations, we concluded that fully accounting for our obligations to posterity requires thinking of our obligations not to harm in impersonal terms. That is, in noniden-

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<sup>46</sup> See, for example, John Stuart Mill's classic work *Utilitarianism*. JOHN STUART MILL, *UTILITARIANISM* (1861).

<sup>47</sup> See, e.g., IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (1785). For more contemporary examples, see John Rawls's *A Theory of Justice* and T.M. Scanlon's *What We Owe Each Other*. JOHN RAWLS, *A THEORY OF JUSTICE* (1971); SCANLON, *supra* note 15.

tity cases, we have to step away from merely considering the effects of our choices on individuals who would have existed in any case and think about the repercussions of our choices on the world as a whole. Put another way, in such cases we have to consider our impact on states of affairs (which will involve some individuals or others) rather than our impact on determinate individuals (who would exist no matter what we do). Stated even more simply, we have to think in terms of impersonal consequences.

What unites the two conclusions is the thought that consequentialism enjoys an advantage over its deontological competitors on both scores: assigning moral status and handling nonidentity cases.<sup>48</sup> I believe there is a lesson here. I do not claim that utilitarian theory, which is much maligned today among legal theorists and moral philosophers, is vindicated. But I note that *in the myriad discussions of the strengths and weaknesses of utilitarian theory that one finds in the literature, these two strengths are almost never, if ever, mentioned*. If the arguments of this paper are on the right track, utilitarian theory has two major advantages that ought to be acknowledged.

At the same time, it is well known that utilitarianism faces significant challenges. Indeed, Hockett's paper nicely highlights some of these challenges. Can any version of utilitarianism adequately meet them and emerge as a viable ethical theory? I have no clear conviction on this score. Rather, I find myself impressed with the way in which utilitarianism—or, more broadly, consequentialism—not only seems capable of making sense of moral status and nonidentity cases, but seems very possibly necessary for doing so. If I were required to cast my lot with some form of consequentialism today, I would choose a sophisticated rule-consequentialism that gives some priority in evaluating consequences to those who are worse off.<sup>49</sup> But that's food for thought at another intellectual feast.

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<sup>48</sup> For those seeking explicit definitions, by "consequentialism," I mean the very general approach to ethics that evaluates right and wrong entirely in terms of an action's expected consequences. Utilitarianism is a more specific consequentialist approach that requires of right action the maximization of good over bad consequences. By "deontology," I mean that broad class of ethical theories that, like consequentialism, focuses on the moral evaluation of actions—as opposed to character (the focus of virtue ethics)—but, unlike consequentialism, employs some criteria that are related to action-types (e.g., lying) and unrelated to consequences in this evaluation.

<sup>49</sup> I have in mind something along the lines of Brad Hooker's *Ideal Code, Real World*. BRAD HOOKER, *IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY* 59 (2000) (suggesting that "a prioritarian rule-consequentialist should balance aggregate well-being against priority for the worst off").