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# Legislating for the future: situated health and embodied justice

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## Abstract

In response to the short-term political cycles that govern law-making, there is growing international attention to the obligations owed to future generations. Within the diverse approaches there is often a single, temporally defined inequality; that is, between now and a depleted future. While inequality is imagined between generations, these generations are often constructed as homogenous. This elides not just contemporary inequalities, but that these injustices are caused by historically rooted inequalities that current planetary threats are likely to deepen. In response, we centre health inequalities which illustrate the complex temporalities and structural causes of inequalities. We argue for a focus on eco-social and embodied generations to better understand – and respond to – inequalities past, present and future. We apply this focus to the Capabilities Approach as an example of the work needed to better articulate what is owed to present and future generations to secure justice and inform future-oriented law-making.

**Keywords:** health inequalities; climate change; future generations; Capabilities Approach; health; embodiment

## 1 Introduction

Law- and policy-making are shaped by particular temporal frames that can militate against longer-term thinking (Caney 2019). This has compromised the capacity to address some of our most significant global challenges, including climate change, pandemics, global inequalities, mass human migration, nuclear dangers and unregulated AI. The limitations of a law-making process tied to short-term political cycles have prompted calls for future-oriented governance. This has led to burgeoning work across disciplines (Boston 2017; Hillgren, Light and Strange 2020; John and MacAskill 2021), and new fields such as future design and future studies. Some of these fields are interested in the institutionalization of future-oriented law and policy development and the potential roles of international and domestic rights and laws (González-Ricoy & Gosseries 2016; Gardiner 2022). Within this there is a growing focus on the rights of future generations. Here, complex debates concern whether our obligations to existing people are more or less important than those owed to future people (Brännmark 2016). Further, ideas of jurisdiction are significant as it becomes necessary to determine whether obligations are limited to members of states or members of the wider global community (Humphreys 2022). For example, there is an obvious tension in high-income countries imposing constraints on resource use by low- and middle-income countries to preserve the climate for future generations when the latter's members may still be living without basic infrastructure such as water and sanitation (Humphreys 2022). The challenge is, as Skogly argues, 'to find a way to secure the rights of current generations, while at the

same time ensure that we do not prevent future generations from enjoying theirs' (Skogly 2021). This requires global redistributive and sustainable approaches to resourcing that are built into our human rights frameworks (Skogly 2021). Some scholars conclude that despite all of the complex challenges of asserting rights of future generations, it is incontrovertible that actions taken now will impact future people, who must be protected in some way (Lewis 2016).

We enter these debates and the discussion of appropriate legal frameworks and institutions for a more just future by considering the subjects and temporalities of intergenerational justice. While we understand the profound importance of imagining more just futures, our primary concern is how inequalities are at times articulated in these discourses. Specifically, approaches to creating obligations to future generations can focus on a single, temporally defined inequality; that is, between now and a depleted future. While inequality is imagined between generations, these generations are themselves constructed as homogenous, leading to the erasure of inequalities within generations. This focus on inequalities between contemporary and future populations – populations that are otherwise imagined as homogenous – is limited in three regards. First, it pays insufficient attention to the pressing need to address contemporary inequalities, demonstrating the violence that takes place whenever the future becomes more important than the present (Cielemęcka and Christine 2019). Second, some of our most significant and damaging inequalities are caused by historically rooted and entrenched harms that are yet to be meaningfully addressed or repaired. Third, it elides the fact that without action, climate change and other planetary threats will compound and deepen extant inequalities (Intergovernmental Panel on Climate Change 2023; Adams et al. 2022).

Our article responds to these issues of equality and time through the lens of health. Health inequalities are a profound social injustice that illustrates the complex temporalities and structural causes of inequalities. A focus on health also directs us to consider the body as a site for understanding and articulating the obligations of state and non-state actors to both human and non-human worlds. This leads us to argue for a focus on ecologically situated and embodied generations in efforts to shape legal responses to past, present and future inequalities. Recent decades have seen the development of a number of embodied theories of justice, where the body is positioned as a means of redefining state obligations to its citizens (Lewis and Thomson 2019). Within these theoretical developments that include the discourses of precariousness (Butler 2004), vulnerability (Fineman 2010, 2020), capabilities (Nussbaum and Sen 1993; Nussbaum 2000; Sen 1980, 1992, 1999, 2010), social flesh (Beasley and Bacchi 2007) and depletion (Rai et al. 2014, Goldblatt and Rai 2017), the body is positioned as a site for understanding and responding to our common humanity and our individual ethical worth. As such, our embedded physicality is mobilised in the quest for a state more responsive to human need (Fineman 2010).

There is potential for each of the embodied theories of justice to provide a framework whereby obligations to present and future ecologically situated generations may be articulated. Here, we have chosen to illustrate this using the Capabilities Approach. While the approach has made less impact in legal scholarship than it has in a number of other disciplines, socio-legal scholars from diverse fields have nevertheless mobilised it in important ways to address deficits in law and governance (Furgalska 2023; Goldblatt 2005; Fox and Thomson 2013; Thomson 2021; Lindsey and Harding 2021; Dixon and Nussbaum 2012, 564; Fredman 2008; Claassen and Gerbrandy 2016a; Deakin and Rogowski 2011). Here, we mobilise the strengths of the approach, but also deploy it as an example of how embodied – and other – conceptions of justice must develop a more eco-social understanding if we are to secure both human and planetary health. Complementing work on institutional responses to the rights of future generations, we argue that an embodied and eco-social understanding of justice is necessary to guide future-oriented law-making within any institutional innovation. By acknowledging the past and the present of future inequalities, we can imagine the disruptive forms of justice that must be enacted (Travis 2022, 19).

Aligning law to the future can be both a reactionary and a radical project. Our attempt to engage its radical possibilities stems from an optimism in the potential for change informed by a

responsiveness to injustice and a belief in the human capacity to imagine a better future. At a time of profound environmental despair, and wider distress at the scale of suffering and the global challenges that confront us, an affective regard for future others is inherently positive. The shift in focus from the needs of present peoples to future humans involves an ontological reorientation that may also facilitate a wider understanding of our ecological responsibilities.

We start by noting some of the key practical attempts to reorient law-making towards the future (part 2). From here, we start building our argument by locating it within health inequalities and their temporal dimensions (part 3). We note the importance of health and health equity, before outlining the current distribution and causes of health inequalities. We attend to the impact of past harms to the bodies of those who have experienced systemic inequalities and examine the growing understanding of the health impacts of environmental harms related to climate change. These examples inform an eco-social understanding of human life, and we engage with the Capabilities Approach as an example through which to develop these understandings (part 4). In doing so, we foreground the place of health within the approach and acknowledge its ‘protoecological’ beginnings (Thompson & Bendik-Keymer 2012, 17). Finally, we illustrate our argument by considering *Measuring What Matters*, Australia’s recent introduction of a well-being framework (Commonwealth of Australia 2023). We argue that attention to the Capabilities Approach, and within this Indigenous capabilities, can enhance the framework to better respond to health inequalities and the complex temporalities these are embedded within. In doing so, we argue that an embodied and ecologically situated approach to justice can strengthen many of the interventions in the area of future-oriented rights, law and policy.

## 2 Institutional responses for future-oriented law

Obligations to future generations that are built into laws and policies are seen as a way of holding current decision-makers responsible for the long-term implications of their governance. Various institutional mechanisms exist or have been proposed at international and national levels to entrench these obligations and inform decision-making. At the global level, the United Nations (UN) Sustainable Development Goals may be seen to be concerned with the well-being of future generations, though this is the subject of debate (Soltau 2021; Oliveira 2018; United Nations General Assembly 2015, para 53). Less contentiously, the UN Secretary-General’s report (United Nations Secretary-General 2021) ‘A Common Agenda’ included a strong focus on future generations and ‘long-term thinking’. It proposed a range of measures including: ‘a repurposed Trusteeship Council, a Futures Lab, a Declaration on Future Generations and a United Nations Special Envoy to ensure that policy and budget decisions take into account their impact on future generations’ (United Nations Secretary-General 2021). Most recently, the 2022 UN General Assembly resolution on the human right to a clean, healthy and sustainable environment explicitly refers to the rights of future generations (United Nations General Assembly 2022); and an expert group has produced the Maastricht Principles on the Human Rights of Future Generations (Liebenberg and Franco 2023).

At the national level, there is increasing recourse to litigation to assert the rights of future generations, particularly in environmental and climate matters. Some of these are based on constitutions, where there are frequent references to future generations (Lewis 2016). These often relate to environmental protections which are seen as ‘posterity provisions’ to encourage states to ‘make more future-oriented deliberations and decisions’ and to improve public awareness and debate about issues that affect future generations (Ekeli 2007, 378). These rights are sometimes tied to rights to health such as in the Constitution of the Kingdom of Norway (Article 110(b)), which refers to a right to an environment that is *conducive to health*, protected for future generations. Similarly, s 24 of the Constitution of South Africa provides to everyone a right ‘to an environment that is not harmful to their health or well-being... for the benefit of present and future generations’.

While constitutions may acknowledge the rights and interests of future people, often in preambles, they generally lack specific mechanisms to ensure that legislatures undertake their work in accordance with these rights. This has led a number of countries to consider ways of institutionalising questions of the future into processes for policy- and law-making. For example, Finland has a parliamentary standing committee on issues related to the future (Scott and Malivel 2021, 189–190), and Israel had a parliamentary committee from 2001 to 2006, while Singapore considers these issues in a portfolio within the Prime Minister’s office (Jones et al. 2018, 156–157). Some jurisdictions have instituted bodies to consider future generations outside of parliament and government, such as Hungary (2012–2018), Scotland (since 2005) and Wales (since 2016) (Jones et al. 2018; Lewis 2016). Institutions and bodies in this field tend to have only advisory powers, as opposed to, for example, the power to commence legal action or enforce compliance through penalties (Radovoi and Rayman-Bacchus 2021). Nevertheless, this does not preclude influence, as seen with the *Well-being of Future Generations (Wales) Act* (2015). The Act, and its first commissioner, Sophie Howe, have delivered change nationally and been influential beyond Wales in offering a model to other countries and encouraging measures at UN level (Future Generations Commissioner for Wales 2021).

Our primary focus in this article is not the institutional structures that may be introduced to address the rights of future generations, but the deliberative frameworks necessary to support work within such institutions. In arguing for a focus on embodied and ecologically situated generations within any deliberative framework, we move now to consider the example of health inequalities, including as they develop and persist over time. We start by outlining the present experience of health inequalities, noting how these are grounded in social inequalities. We then illustrate how these inequalities can have their origins in historic harms, before demonstrating how health inequalities are likely to deepen as climate change hastens. While our focus is on the need for a more dynamic understanding of inequalities in these debates, we also foreground the ways in which health – and human life more generally – cannot be severed from the social and natural worlds.

### 3 The value of a health inequalities lens in considering future others

Much of the work that has started to articulate the rights of future generations has focused on the climate crisis (Weiss 2008; Lewis 2016). Where health is engaged, it is generally secondary, noted in terms of the impact of climate change on health. We centre health and health inequalities in this discussion, recognising the special significance of health (Ruger 2009). Here we acknowledge that health is foundational to well-being and that it enables us to participate in social and political life. This means that inequalities in health are inequalities in opportunity and freedom. Importantly, such inequalities are neither natural nor inevitable but instead the ‘expression and product of unjust economic, social, and political institutions’ (Peter 2001, 160). Many of these determining factors are historic in their origin and have generated intergenerational experiences of poor health and the harms this causes. Understood in this way, health inequalities are a profound social injustice, and health equity has been identified as an essential element of the broader pursuit of social justice (Ruger 2009; Powers and Faden 2006; Fox and Thomson 2013).

Here we argue that centring health inequalities provides important insights into the complex, structurally determined and intergenerational experiences of inequality. As Fabienne Peter notes, ‘[A] society’s achievements and failures in health may contain important information about the injustice of particular social arrangements and thus supplement our assessment of these arrangements in general’ (Peter 2001, 163). Better understanding of the nature of inequalities is essential if we are to properly address the rights of future generations and deliver a more socially just future, including in the context of climate change. We begin this section by highlighting the current patterning of health inequalities before discussing how these often have their origins in historic harms and inequalities. From there, we address how such inequalities are likely to be exacerbated by current planetary threats.

### 3.1 Contemporary health inequalities

Significant health inequalities exist both between and within countries, with social inequalities responsible for a major part of these inequities (World Health Organisation Commission on the Social Determinants of Health 2008, 1). It should not surprise, then, that health disparities occur on a gradient from the 'have-leasts to the have-mosts' (Burris 2011, 1652). As the landmark World Health Organisation Commission on the Social Determinants of Health (2008, 1) explained, the poor health of the poor is:

... caused by the unequal distribution of power, income, goods, and services, globally and nationally, the consequent unfairness in the immediate, visible circumstances of people's lives – their access to health care, schools, and education, their conditions of work and leisure, their homes, communities, towns or cities – and their chances of leading a flourishing life.

Social Determinants of Health (SDH) research has produced compelling data on the links between social inequalities and the distribution of poor health since the 1990s (Marmot et al 1991; Marmot et al 2010; Wilkinson and Marmot 1999; Wilkinson and Marmot 2003). As noted, these inequalities should be a significant concern because of intrinsic harm, the way they limit opportunity and participation, and because these effects are frequently intergenerational (Aizer and Currie 2014). Yet, health inequalities also indicate other inequalities and social injustices, with health providing a measure of social and economic progress. As Fabienne Peter (2001, 159) notes, '[T]he more unequal a society, the worse its achievements in . . . health'. Sridhar Venkatapuram (2011, 21) provides a broad account of why we should be concerned about health inequalities:

Inequality in the domain of health can be bad because it puts people in unequal status; because inequality in health leads to socially corrosive effects in other domains; because the determinants of inequality in health . . . are also independently unjust and so forth.

This underscores the fact that our concern for health should not be reduced to how well health services function (Thomson 2022), but rather we need to attend to 'the conditions in which people are born, grow, live, work, and age, and the inequities in power, money, and resources' (Marmot et al 2020). Notwithstanding decades of empirical evidence, and the practical and theoretical frameworks this has generated, Amartya Sen has nevertheless been able to correctly note that 'given what can be achieved through intelligence and humane intervention, it is amazing how inactive and smug most societies are about the prevalence of the unshared burden of disability' and ill-health (Sen 2010, 261).

In terms of this unshared burden, while at times income and poverty have been a disproportionate focus (Ingleby 2012), the importance of factors such as gender, race, disability, and their intersection are now more often recognised. So, increasing attention is being paid to why, for example, some minoritised ethnic groups suffer from disadvantage in each of the social determinants, leading to a racial patterning of health inequalities (Marmot et al 2020, 7). While structural racism has been identified as a 'fundamental cause' of racialised health inequalities (Williams et al 2019, 107) – and racism identified as a public health crisis (Paine et al 2021) – it has remained a relatively minor concern in research and practice. This may, however, change in the wake of COVID-19 and its impact on wider understandings of how 'ethnoracialised differences in health outcomes have become the new normal across the world' (Yaya et al 2020). In illustrating the 'colour of health' so starkly, the pandemic has drawn attention to structural racism – and structural gendered racism (Pirtle and Wright 2021) – and the intersection with the social determinants framework (Marmot et al 2020). This, in turn, has highlighted the historic origins of the institutional discrimination and resource inequalities that drive contemporary racialised health inequalities.

### **3.2 Historic origins of today's health inequalities**

Gendered and racialised health inequalities have their structural causes in long-standing patterns of inequality that intersect. In terms of racialised health inequalities, this can be linked to practices of colonialism and its ongoing legacies in 'racially codified economic and social inequality' (Wilkins 2019, 8). Thus, social stratification is intimately linked to racial and ethnic diversity and, in particular, to practices of large-scale immigration, oppression of Indigenous groups by settlers and slavery (Ingleby 2012). In terms of the SDH framework, Zinzi Bailey, Justin Feldman and Mary Bassett (2021, 769) argue that the multiple domains where structural racism affects health can all be characterised by three central features: that is, the 'harms are historically grounded, involve multiple institutions, and rely on racist cultural tropes'.

Complementing a social determinants approach, a number of fields of knowledge have emerged to attempt to provide the biological mechanisms that link past harms with current health inequalities. Of note is the field of social epigenetics (Lewis and Thomson 2019; Thomson 2023), with its focus on the impact of environmental or social factors – such as pollution, neglect, abuse, racism, malnutrition, income and educational attainment – on the epigenome (McKevitt et al 2019). Here, epidemiological and laboratory studies are interpreted as evidence that experiences of discrimination, disadvantage and trauma can become part of our genetic 'memory' (Meloni and Testa 2014). In this, the research domain traces the contours of the social determinants of health, with social epigenetic studies linking inequalities in key determinants with a greater burden of ill-health and higher mortality rates. These studies address the epigenetic impacts of historic and contemporary social inequalities that can have their origin in colonial practices and abuses. In this, they challenge any bright line drawn between past, current and future generations.

In illustrating the complex temporalities and aetiology of health inequalities, Jonathan Wells' work linking inequalities in contemporary cardiovascular risk and the legacies of colonialism provides an important example (Wells 2020). Wells has coined the term 'metabolic ghetto' to describe the cardiovascular effects at population level, and across generations, of experiences of sustained malnutrition (Wells 2007). Wells focuses on the effects of nutritional deficits experienced under conditions of colonial rule. As he writes: 'When one population systematically exploits another population, the resulting loss of maternal capital can expose a population of foetuses to a disadvantaged niche... a metabolic ghetto' (Wells 2020, 11). Drawing on anthropometric data, Wells argues that undernourished mothers in colonial contexts consistently give birth to low-birth-weight babies. This is epigenetically mediated, and it is argued that it ensures offspring do not exceed 'maternal capital' and are adapted to low-nutrient environments. Such responses are 'likely to boost survival in early life under harsh conditions, but at the cost of contributing to the persistence of small size and low metabolic capacity across generations' (Wells 2020, 12). Low-birth-weight infants typically experience poorer health outcomes. These intergenerational effects are not ameliorated by sudden improvements in nutritional availability. Indeed, increases in body weight from higher levels of nutrition (particularly of the cheaper, low-quality and higher-fat foods available to poorer populations) mean that 'metabolic capacity' (what the vital organs can deal with) can be overcome by 'metabolic load' (the demands of large tissue masses, a high-calorie diet, and limited exercise) (Wells 2020, 2). In this, Wells brings together epigenetic, behavioural and physiological plasticity. These compounding and intergenerational effects offer an explanation of contemporary health inequalities and how they are shaped by interrelated historic and contemporary inequalities (Wells 2020, 13).

### **3.3 Future health inequalities in a changing climate**

Recognition of the relationship between health inequalities and social inequalities has directed attention to the interconnection of human and environmental health, whereby contemporary and future health are not only shaped by past and current social inequalities but are also increasingly

shaped by human destruction of our ecosystems. Human and environmental health are intimately linked – with environmental determinants of health interacting closely with a variety of social inequalities (World Health Organization 2020). The connections between climate change and health impacts are increasingly clear. The Intergovernmental Panel on Climate Change (IPCC) 2023 Synthesis Report noted that climate change has already adversely affected the physical and mental health of people globally (IPCC 2023, 16). It explained that ‘climate change impacts on health are mediated through natural and human systems, including economic and social conditions and disruptions’ (IPCC 2023, 16). In terms of natural systems, this ranges from human morbidity and mortality resulting from extreme heat events to the increase in water- and food-borne diseases. Increasing temperatures, trauma from extreme events and loss of livelihoods and culture are driving increased mental health challenges. With human systems, air pollution has increased, with urban heating and infrastructure being disrupted. These impacts and disruptions strain already inadequate health services.

The IPCC Report points to profound inequalities that will worsen the impacts of climate change for some populations. As the Report details, the most susceptible are those in regions that face ‘considerable development constraints’ and those in ‘locations with poverty, governance challenges and limited access to basic services and resources, violent conflict and high levels of climate-sensitive livelihoods’ (IPCC 2023, 17). The Report also notes that ‘vulnerability at different spatial levels is exacerbated by inequity and marginalization linked to gender, ethnicity, low income or combinations thereof’ (IPCC 2023, 17). As discussed in the preceding section, these inequalities are in many regards historic in their origins. As the crisis escalates, this will compound and deepen inequalities that have been experienced by some populations for generations.

Climate change is acknowledged as an existential threat, yet it sits amongst other environmental crises that have collectively provoked a concern for planetary health. Addressing planetary health, the Rockefeller Foundation–*Lancet* Commission (Whitmee et al 2015, 1973) concluded that economic and development gains have been pursued at the cost of the health of future generations:

By unsustainably exploiting nature’s resources, human civilisation has flourished but now risks substantial health effects from the degradation of nature’s life support systems in the future. Health effects from changes to the environment including climatic change, ocean acidification, land degradation, water scarcity, over-exploitation of fisheries, and biodiversity loss pose serious challenges to the global health gains of the past several decades . . . These striking trends are driven by highly inequitable, inefficient, and unsustainable patterns of resource consumption.

This is an important statement on the relationship between planetary and human health, with climate and environmental damage positioned as the key threat to future human health. However, in suggesting equally enjoyed global health gains that are now equally threatened by unsustainable use of resources leading to climate change and environmental depletion, the Commission repeats the narrow understanding of inequality that we seek to challenge. Climate change and many of the environmental harms listed by the Commission are both unequal in their origin – the product of disproportionate extraction and consumption by high-income countries – and unequally experienced by the ‘have-leasts’ and the ‘have-mosts’ (Burris 2011, 1652). Many parts of the global South are facing more extreme impacts with less capacity to respond to climate and environmental harms. Within wealthier countries, climate change disproportionately affects poor people, the elderly, people with disabilities, women, Indigenous peoples and minoritised racial groups. The growing incidence of extreme climate events, including heatwaves, flooding and fires, more often affects poor people, who are less able to protect their property, livelihoods and lives. More routine and increasing climate impacts such as higher temperatures often affect poor neighbourhoods in

cities, where housing is inadequate and heat management such as tree cover is absent. Such urban segregation is, of course, often historic in both cause and experience.

Overcoming structural inequalities at the local and global levels is clearly necessary to achieve the interlinked goals of climate and health justice (Williams and MacNaughton 2021). Addressing the rights of people living now by tackling key environmental drivers of ill-health, such as pollution, improves the prospects of healthy environments for future generations. In this way, tackling inequalities now has cross-temporal impacts on future rights holders. But sustainable responses to resource use must align with efforts to provide adequate nutrition, healthy neighbourhoods, accessible health services and other essential components of good human health rather than expect the poor to sacrifice these goods long overused by wealthy nations and groups. A focus on health inequalities, past, present and future, illustrates our argument that supporting the rights of future generations cannot occur without confronting the complex historical and contemporary inequalities that are embedded in the lives and bodies of humans. It also requires us to acknowledge that our health is entirely dependent on the health of the non-human world. This requires, as Donna Haraway (2016) has argued, that in seeking solutions for the future, we ‘stay with the trouble’ of living together on our damaged planet.

#### 4 Situated and embodied generations

One of the challenges of ensuring the rights of future generations relates to the unknowability of what such future people – in all their differences – may want and the risk of imposing today’s values and ideas on future others. A focus on equal access to a healthy life, as a prerequisite for any life, whether valued in current terms or not, provides a compelling case for centring health in any approach to future planning. We would also argue that it allows us to attend to past and present injustices as we work towards social and climate justice for future generations. As such, this is a project that reanimates the past and engages the present in order to imagine and produce more equitable futures (see Braidotti 2019a, 8).

In stressing the need to respond to the relationship between time and inequalities, we argue that centring health can challenge some of the undifferentiated understandings of equality in debates regarding the rights of future generations. A focus on health also helps to articulate *how* the rights of future generations may be secured with greater social justice. Adopting a broad social determinants model – foregrounding the need to improve fairness in social arrangements and the distribution of resources (Thomson 2022) – can start to account for historic and entrenched inequalities, address contemporary injustices and promote a future that is not just liveable in terms of the environment and availability of resources but is also more egalitarian. In addressing health, and the relationship between the social and the material, we explore what it might mean to *embody* generations that are the subject of the debates and the institutional innovations we have addressed.

In turning to embodiment, we seek to import into these debates and institutional responses an ethical framework that centres the embodied lives of interconnected generations. By acknowledging that these embodied lives are situated within, rather than separated from, the non-human world, the focus on environmental and planetary health becomes central to the quest for more socially just and healthy futures. One such effort to situate embodied theory and orient it to the future can be found in the work of Jessica Eisen, Roxanne Mykitiuk and Dayna Nadine Scott (2018). These authors consider unequal – alongside uncertain – health impacts through the example of toxic chemicals, which raise issues of intergenerational harms and the relational impacts of non-human agents such as ‘matter, ecologies and chemical flows’ (Eisen et al 2018, 28). Grounded in relational theory, and attentive to the human subject’s relationship to the non-human, they argue for an ‘intergenerational environmental justice’ that acknowledges reciprocity between current and future generations (Scott and Malivel 2021, 179).



Sharing these concerns, our regard for embodied future others draws on the development of embodied theories of justice (Lewis and Thomson, 2019). While this embodied humanist discourse has sought to counter existing ethical and political models of responsibility (Murphy 2011), these models have generally been limited in their engagement with ecological systems and non-human worlds. As such, lessons from ecofeminism, posthumanism and Indigenous understandings of nature that stress that humans are enmeshed in their environments and planetary ecosystems have rarely penetrated (Braidotti 2013; Haraway 1991). Some of this work has started, as seen in the article by Eisen, Mykitiuk and Scott (2018). It is also evident in Angela Harris' (2014) attempt to reframe Martha Fineman's vulnerability theory as 'ecological vulnerability' bringing together critical and 'green' legal theory with the aim of achieving social and planetary justice. These important shifts in embodied theories of justice are a response, in part, to the urgency of the climate crisis, which has brought our ecological situatedness starkly into view. Acknowledging the imperative for eco-social approaches to future-oriented justice, we turn now to explore the potential of the Capabilities Approach.

#### 4.1 Revisiting the Capabilities Approach

Amartya Sen, Martha Nussbaum, and others have developed the Capabilities Approach in four decades of work (Nussbaum and Sen 1993; Nussbaum 2000; Sen 1980, 1992, 1999, 2010). The approach focuses on what is required to foster individual opportunity or freedom and – through this – human well-being and flourishing. For advocates of the Capabilities Approach, the central question in assessing a society for its basic decency or justice is, 'What is each person able to do and to be?' (Nussbaum 2011, 18). As such, social justice is conceptualised in terms of people's capabilities or opportunities. This can be expressed as their 'effective opportunities to undertake the actions and activities that they want to engage in, and be whom they want to be' (Robeyns 2005, 95).

The driving concern for this approach is the social and institutional structures within which individuals are embedded and the extent to which this either enables or limits opportunities and therefore flourishing (Dreze and Sen 2002, 6). Centring this embedded individual as the object of ethical concern reflects the approach's genesis as a counter-theory to models of welfare or development that rely on aggregated measures of well-being or on proxy measurements such as gross domestic product (Sen 2010, 48). As Sen states, the Capabilities Approach 'proposes a serious departure from concentrating on the means of living to the actual opportunities of living' (2010, 233). In focusing on opportunities or capabilities, an important element of the approach is the attention paid to factors that influence the ability of individuals to convert resources into functionings; that is, to achieve what they want to 'do and to be' (Nussbaum 2011, 18). These conversion factors address the social, institutional, structural and environmental conditions that prevent or enable an individual's capacities to become effective opportunities and freedoms. These range from law, social and environmental factors 'to the most specific resources and skills needed to exercise freedoms' (Hart and Brando 2018, 298).

The Capabilities Approach has been subject to criticism within liberal philosophy (Pogge 2010) and by theorists on the left (Dean 2009), including those who raise important feminist critiques (Okin 2003; Phillips 2001). Concerns include its focus on opportunity and freedom over equality of outcome (Kanbur 2020; Phillips 2001). The place of the individual within the approach has also generated criticism. It is argued that the central place of the individual contributes to the failure to acknowledge structural inequalities within the capitalist economic and political systems (Phillips 2001). It is also argued that the individualism of the approach elides relationships of care as well as the values of solidarity and community (Dean 2009). Others, however, have questioned whether these criticisms correctly identify the nature of the individual articulated by Sen, Nussbaum and others or recognise the approach's primary focus on structural barriers to human flourishing and social justice (Thomson 2021). As Ingrid Robeyns (2005, 95) notes, in challenging proxy measures of human well-being, Sen's is an 'ethically or normatively individualist approach, but it is neither

ontologically nor methodologically individualistic'; and thus that a commitment to the individual as the object of ethical concern 'is not incompatible with an account of personhood that recognises the connections between people, their social relations and their social embedment'. Elsewhere, the Capabilities Approach has been endorsed by some who see its radical liberal promise as consistent with more structural approaches, including in relation to human rights (Balakrishnan *et al.*, 2011; Fredman 2008).

Mindful of these debates, we engage with the approach by acknowledging its flexibility as a normative language and its long history of practical application, including within the UN (Deneulin 2014). We also acknowledge that the approach is inherently future-focused (Poli 2015). It is directed at creating the conditions that enable future decision-making and agency, a central concern of discourses and practices directed at future generations. It is also significant that health has been central in its genesis and development, and we focus on the capability to be healthy. In doing so, we extend current formulations of this capability to more explicitly and fully acknowledge the importance of the non-human world and planetary health. We use the approach as an example to argue that embodying generations in this way is essential to secure health equity and – through this – a more just present and future. Engaging with the Capabilities Approach in this way provides an important example of how our ethical models must be ecologically reorientated as we respond to threats to planetary health.

#### **4.2 Capabilities and health**

With our focus on health, it is important to map the multidimensional relationship between health and the Capabilities Approach. In terms of the approach's principal architects, Nussbaum has sought to articulate a set of central capabilities for any democratic order. Her ten central human capabilities start with life, bodily health and bodily integrity (Nussbaum 2011). For Sen (2005, 377), while he has refused to articulate a fixed list – or 'grand mausoleum' – of capabilities, he has repeatedly included health in his articulation of intrinsically valuable or basic capabilities. This has been built upon in work that has identified health as both a meta-capability and a subset of all capabilities (Venkatapuram 2011). Here, health is identified as central to people's ability to realise their capabilities; it enables people to do and to be what they have reason to value, pursuing life projects and goals.

Yet in the development of the approach, capabilities have also been identified as essential *for* health. Thus, the approach has been central to social determinants of health research and its theoretical development. Michael Marmot's foundational work on health inequalities draws on the approach to argue that the control individuals can exercise over their environments is a key determinant of health outcomes (Marmot 2004). Greater control is provided by increasing the capabilities people have; that is, the opportunities they may choose from in determining their life course. The approach has provided a normative framework to understand and address health and other inequalities. Thus, Sridhar Venkatapuram identifies capabilities as central to achieving health justice, arguing that every human being has a moral entitlement to a capability to be healthy commensurate with equal human dignity in the contemporary world (Venkatapuram 2011, 19). This entitlement is to the social bases of this capability. Identifying four factors that determine health – individual biology, individual behaviour, the physical environment and social conditions – the moral claim translates to social interventions into these factors in order to create a capability to be healthy that enables equal human dignity (Venkatapuram 2011, 19).

#### **4.3 The capabilities of future generations**

A number of scholars have addressed the potential role of the Capabilities Approach in securing the rights of future generations. Rutger Claassen (2016b), for example, sees the approach applying intergenerationally through sustainable use of the earth's resources by engaging a principled

response to ecological impact. Alternatively, Nicky van Dijk (2021) has argued that the Capabilities Approach is helpful in thinking about the well-being of future people in terms of their opportunities rather than in terms of their resources, income, desires or happiness. In proposing a draft set of capabilities, she considers the views of current people as a proxy for future generations but acknowledges that any approach – whether current or future-focused – must take account of human diversity, agency and indeterminacy.

While this work is important in orienting the Capabilities Approach towards future-oriented policy-making, it needs to go further in situating its human subjects within their ecological context. We argue that an eco-social reframing of capabilities is essential to acknowledge the indivisibility of human and planetary health as well as the non-instrumental rights and interests of non-human entities and ecosystems. Here, it is important to note that the Capabilities Approach can be understood as ‘protoecological’ in conception (Thompson and Bendik-Keymer 2012, 17). Nussbaum, for example, identifies the capability for having relationships with ‘plants, animals, and the world of nature’ as one of the ten central human capabilities to which citizens have as an entitlement (Nussbaum 2011). In a similar vein, Venkatapuram’s capabilities-driven model identifies the physical environment as one of the four underpinnings of health and health justice. The physical environment is therefore essential for the realisation of other capabilities. Articulating nature and the physical environment in this way is an important shift in acknowledging that our flourishing depends on the non-human world. It can, however, be seen as instrumental and limiting. This is also seen in the recent United Nations General Assembly (2022) resolution on the right to a clean, healthy and sustainable environment. While it may serve to ‘green’ human rights, it may also extend the anthropocentric notion that the environment must be protected for our benefit or survival, not for its own sake.

Bringing concern for the environment together with the rights of future generations, similar instrumental arguments are made elsewhere in the capabilities scholarship. Fabian Scholtes (2010), for example, addresses how the irreversible loss of environmental resources will limit the agency and well-being of future generations. Actions taken now will determine how resources are used, foreclosing the ways in which future generations might use these resources in ways they may value. This ‘environmental domination’ conflicts with the approach’s central goal of enabling people to lead the kinds of lives they have reason to value. Breena Holland develops this within Nussbaum’s framework, arguing that climate change will undermine the ‘ecological conditions for justice’. These are met when each person has a threshold level of each of the capabilities necessary for a good life *and* when ecological systems are such that they provide the resources to support these capabilities (Holland 2008). Mirroring arguments regarding health, Holland (2008) identifies this capability as a meta-capability.

Such approaches conceive of the environment’s value in relation to human capabilities. It is a familiar ‘ecosystems services’ (Duraiappah 2005) or ‘ecological capital’ (United Nations 1987) model. While we acknowledge the significant shift in situating humans within the environment, the Capabilities Approach, as with other embodied theories, should account for posthuman and other theories that recognise the intrinsic worth of the non-human as well as ecosystems and our relational position within these. Nussbaum (2006, 2023) is a firm proponent of the rights of non-human species. As with humans, it is individual animals that are the bearers of capabilities. Nevertheless, this means that care for ecosystems is again derivative, depending on whether or how such systems are necessary to promote the good of (human or animal) individuals that rely on them. While the individualism of the Capabilities Approach is intended to put the individual – rather than gross domestic product or other proxies for human development – at the centre of ethical concern, it has limitations in considering the inherent value of ecosystems and other aspects of the non-human world (Bendik-Keymer 2020). In response, David Schlosberg (2007, 148) argues for a systems approach that recognises the dynamic interdependence of life forms. He argues for conceptualising ecosystems as ‘living entities with their own integrity’. Following this, addressing health and ecological justice through a capabilities lens demands recognition of the

potential of an ecosystem ‘to maintain its integrity, and to flourish’ (Schlosberg 2007, 148). This eco-social re-imagining of the Capabilities Approach demonstrates how it is both necessary and possible to rethink our ethical and legal frameworks in considering our responsibilities to future others as environmental degradation and the climate crisis deepen. We explore our arguments further in the next section, where we critically consider Australia’s introduction of its first well-being framework.

#### **4.4 Responding to Measuring What Matters: The Capabilities Approach, health and future-oriented policy and law**

A central motivation for the Capabilities Approach was as a challenge to measures of well-being that rely on a state’s aggregated production or wealth (Sen 2010, 48). Such measures ignore the profound inequalities that can persist, or indeed deepen, as a nation’s production or wealth increases. In this, the Capabilities Approach has provoked the development of alternative measures, starting with the UN Human Development Index in 1990. More complex systems of measurement have since been adopted nationally and supranationally, with a focus on frameworks that have a closer bearing on people’s lives. The Organisation for Economic Co-operation and Development’s (OECD) *Better Life Initiative* is an example of how these frameworks have evolved, with a focus on four central dimensions: natural, social, human and economic capital (OECD 2020). This framework has been recognised as a leading example of where the resources or dimensions of future well-being are identified ( Sangha *et al.*, 2024, 15). In Australia, the Federal Treasurer recently published *Measuring What Matters* (Commonwealth of Australia 2023) based on the OECD framework and similar models that go beyond economic indicators to include broader well-being measures such as environmental and social outcomes. Through a process of public consultation, five well-being themes were adopted as Australia’s first well-being framework: health, security, sustainability, cohesion and prosperity. Inclusion, equity and fairness were identified as relevant across all five themes (Commonwealth of Australia 2023).

The government acknowledged that the new framework is a starting point, with the framework process identified as iterative. Importantly, while it has been initially conceived as a measurement tool, it is stated that ‘the Government will also consider ways to better link policy decisions with consideration of wellbeing metrics and the broad set of considerations captured in this Framework’ (p. 5). More generally, the Government has set out the aspiration that it ‘will underpin the broader efforts of business, community groups and others, to deliver better outcomes and opportunities for Australians’ (p. 5). As such, it is imagined that the content of the framework will be revised and that it will move from a measurement tool to a statement of values to guide decision-making.

While *Measuring What Matters* is an important and welcome advance in embedding well-being into an integrated framework across government policy in Australia, our discussion generates ways in which planned future iterations may be improved, both through a clearer articulation of the rights of future generations and through renewed attention to the Capabilities Approach. Turning to our first concern, the initial framework already has, at times, an implicit future orientation. For example, in discussing early childhood, it recognises that appropriate interventions shape children’s whole lives and that the effects can extend for generations (p. 90). Securing environmental rights also acknowledges future generations, as decisions must attend to the future impacts of decisions made now. More directly, the framework recognises that Australia must ‘anticipate, manage and adapt’ to climate ‘risks’ (p. 53). Nevertheless, we would argue that the next iteration of the framework needs to explicitly acknowledge the rights of future generations. This has recently been seen elsewhere in Australia where a Private Member’s Bill introduced by Federal Senator David Pocock attempts to create a duty of care owed to young people to prevent future climate harms (Pocock 2023).

As already noted, *Measuring What Matters* has its genealogical roots in the Capabilities Approach through the move to human-centred measurement frameworks that the approach provoked. Nevertheless, we argue for a renewed consideration of the approach in future iterations to strengthen the framework's potential impact. We see this in returning to our central focus on environment and health. The framework explicitly identifies the connection between the environment and health in its sustainability theme (p. 45):

Protecting, repairing and managing a healthy and sustainable natural environment is essential for a strong economy, thriving industries, a healthy population, and quality of life. For many Australians – including First Nations people – the natural environment provides a source of cultural and spiritual connection.

This statement provides an important potential foundation for the approach we advocate; that is, that future-oriented law-making should be made within an eco-social framework that promotes health equity. This, we have argued, can help to address past harms, tackle present-day inequalities and help to promote a future that is more equitable. This has a particular resonance for Australia's colonial past and the enduring harms it has created. This has provoked some to articulate Indigenous capabilities (Yap and Yu 2016), which we see as consonant with the eco-social model we have promoted. Further, Sangha, Dinku, Costanza and Poelina (2023) argue for recognition of Indigenous capabilities within Australian measurement frameworks. More specifically, they argue for Indigenous capabilities that reflect the centrality of nature – and specifically Country (Indigenous clan lands) – for well-being and health (p. 15):

Indigenous capabilities such as knowledge of Country, ability to work on-Country, freedom to access Country and perform cultural ceremonies, and lead lives as one wants to, constitutes vital elements of Indigenous wellbeing.

They argue that such capabilities would contribute to addressing the stark health – and other – inequalities that exist between Indigenous and non-Indigenous Australians. These are the products of an ongoing legacy of colonial dispossession, genocidal policies and entrenched inequalities. The Australian Government has recognised that colonisation continues to have a devastating impact on Indigenous communities, culture and health (Australian Institute of Health and Welfare 2022):

Violence and epidemic disease caused an immediate loss of life, and the occupation of land by settlers and the restriction of Aboriginal people to 'reserves' disrupted their ability to support themselves. Together with the forcible removal of Indigenous children from their families and communities, Indigenous Australians have suffered ongoing inter-generational trauma. These factors are recognised as having a fundamental impact on the disadvantage and poor physical and mental health of Indigenous peoples . . . , through social systems that maintain disparities.

Health inequities experienced by First Nations people have been a focus for government policy intervention since the first *National Aboriginal Health Strategy* in 1989. Nevertheless, this and other interventions such as the landmark *Closing the Gap* initiative – a national programme introduced in 2009 to address significant health and other inequalities experienced by First Nations people (Australian Government 2009) – are seen to have achieved little (Davis 2015; Bond and Singh 2020). After more than thirty years of policy attention, Indigenous Australians continue to die nearly nine years earlier than non-Indigenous Australians. Other key indicators are 'flatlining or going backwards' (Schultz 2020, 11). As Parter and colleagues stress (2021), 'What

has been missing from these policy commitments is the genuine enactment of the knowledges that are held by Indigenous Australians relating to their cultural ways of being, knowing and doing’.

Attention to Indigenous capabilities – that is, valuing and enabling Indigenous ways to ‘do and to be’ (Nussbaum 2011, 18) – is essential. We see these capabilities as deeply significant in foregrounding human embeddedness in the natural world. Indigenous capabilities in relation to Country are directly related to well-being and health. They also impact other determinants of health such as education and employment (Schultz 2020, 12–13). While this can help to address colonial dispossession and the injustices that have continued since that time, it is important to note that a focus on Country has the potential to deliver environmental benefits for all Australians, current and future. This is important, as Australia continues its steady decline in country rankings that measure action taken towards the Sustainable Development Goals, from 18th in 2015 to 40th in 2023 (Sustainable Development Report 2023).

Looking more globally, Indigenous care of Indigenous lands is a significant factor for worldwide conservation and therefore planetary health (Garnett et al 2018). Indigenous approaches challenge instrumental understandings of nature and ecosystems – as seen with the OECD’s ‘natural capital’ model that inflects *Measuring What Matters* – to acknowledging the inherent value of the non-human. This is echoed in Schlosberg’s (2007, 148) development of the Capabilities Approach to frame ecosystems as ‘living entities with their own integrity’. This argument for bringing eco-social Indigenous capabilities into Australia’s first well-being framework responds to the many calls for greater attention to be paid to Indigenous knowledges regarding our ecological situatedness, as well as our relationship to time, both past and future (Watson 2014; Yunkaporta 2019; Redvers et al 2020; Moreton-Robinson 2020).

*Measuring What Matters* provides an example of how the Capabilities Approach can impact governmental action through the development of human-centred measurement frameworks. We have, however, highlighted the need to more explicitly develop the framework’s future orientation and have argued for a renewed engagement with the Capabilities Approach as the framework is developed. Importantly, in mobilising this Australian example and engaging Indigenous capabilities that we understand as eco-social, we illustrate how attention to the complex temporalities of health inequalities can provide a lens through which to address past harms and current inequalities while the rights of future generations are protected and promoted.

## 5 Conclusions

Legislating for the future has two dimensions: First, it requires imagining and creating new institutional mechanisms that are mandated to protect the interests of future others. Second, and the focus of this article, it requires deliberative or ethical frameworks that enable us to articulate how such interests are best protected and promoted. As jurisdictions around the world seek to develop institutions to safeguard the rights of future generations, we argue that law and policy developed within these institutions need to be attentive to ecologically situated and embodied subjects. This will better orient governance in the interests of present and future generations, as public bodies are required to govern within a framework that promotes health equity and, by virtue of this, addresses inequalities and climate change. We have argued that centring health in our ethical and political approaches to the future stresses the intergenerational and entrenched nature of inequalities and the need to repair the past and address the present. As Foluke Adébísi (2022) argues, ‘[C]ollaps[ing] the past, present and future helps us better understand the remnants of the past in the present and the possibilities of the future’.

To centre health in ethical and political deliberation, we have explored the Capabilities Approach. The approach focuses on what is required to foster opportunity or freedom and – through this – human well-being and flourishing. It has been highly influential in developing our understanding of health inequalities and justice. We have, however, explored an eco-social

adaptation of the approach, arguing that it is essential to acknowledge the indivisibility of humans and the environment – and our inability to be healthy without addressing our ecological impacts – if we are to protect and promote the rights of present and future generations. A key aim in this exploration has been to provide an example of how our ethical frameworks must adapt if they are to help structure the necessary new approaches to future-oriented law and policy.

While our engagement with Australia's *Measuring What Matters* allows us to demonstrate the potential of a more eco-socially framed approach, more is needed. As already noted, Sen (2010, 233) characterised the Capabilities Approach as a significant departure from a focus on the 'means of living' to 'actual opportunities of living'. To genuinely attend to the 'opportunities of living' demands we mobilise the Capabilities Approach to identify and challenge the fundamental practices and systems that threaten current and future life. This radical potential for structural, far-reaching change is latent in the approach's foundational propositions and aspirations. Exploring the radical potential of our deliberative frameworks and how they might impact law is essential, for without engaging in the practice of imagining new legalities, 'law will be rendered impotent to deal with the range and magnitude of the threats humanity faces' (Green et al 2022, 2). Central to this is the need to move from anthropocentric to eco-centric approaches to embodied justice. This will enable us to address our responsibilities to each other and our world.

Rosi Braidotti (2008) claims contemporary social theory has tended towards melancholia, negativity and mourning. While perhaps an understandable response to perennial warfare, the climate crisis and global health emergencies, this nevertheless militates against a more affirmative and transformative ethics. In response, Braidotti (2019b) calls for a joyful affectivity and, as part of this, transversal affectivity; that is, a non-hierarchical regard for the human and non-human worlds. While we acknowledge that concern for future generations is a potentially positive starting point, the discussion can nevertheless remain apocalyptic: mired in anxieties about over-consumption, pollution and extinction. Focusing on embodied and ecologically situated subjects forces us to more concretely and constructively imagine the lived lives of current and future generations. This may help to move us towards the transformative politics and structural changes that health and climate justice demand.

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