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THOMAS POGGE AND THE TWO TYPES OF LIBERTARIAN

by

ZACHARY R. HOPPER

Under the Direction of Andrew Altman

ABSTRACT

Thomas Pogge proposes the Health Impact Fund (HIF) as a realistic, feasible reform to the pharmaceutical patent regime that would incentivize pharmaceutical research and reward innovation for medicines based on their impact on the global burden of disease. Pogge advances a human rights-based argument to show that the HIF is a morally required addition to the current pharmaceutical patent regime. One objection to his human rights argument comes from a libertarian appeal to property rights. Pogge's response to the libertarian leads to the counterintuitive conclusion that libertarianism is incompatible with any system of intellectual property rights. This paper will show how Pogge fails to distinguish between what I call *status quo* and *revisionist* libertarian positions on intellectual property. Making this distinction, I maintain, would strengthen the human rights argument and allow Pogge to avoid the counterintuitive conclusion of his response to the libertarian.

INDEX WORDS: Pharmaceuticals, Pogge, Libertarianism, Intellectual property rights

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A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

2013

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Electronic Version Approved:

Office of Graduate Studies

College of Arts and Sciences

Georgia State University

August 2013

ACKNOWLEDGMENTS

I would like to thank Dr. Andrew Altman for his guidance and support while I was researching and writing this thesis. I would also like to thank Dr. Andrew I. Cohen and Dr. Andrew J. Cohen for commenting on the draft of this thesis and for serving on my thesis defense committee. Finally, I would like to thank the philosophy department at Georgia State University for encouraging me throughout the MA program and helping me deepen my understanding of philosophy.

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I. INTRODUCTION

Over the past twenty years, there has been a substantial decrease in deaths worldwide caused by communicable diseases. Despite this progress, millions still die every year from preventable diseases like tuberculosis and malaria, which primarily affect people living in poor countries. The situation for the global poor is dire: "Half the world's population lives in countries that cannot afford annual per capita health expenditures of more than $15, and many people do not have access to even basic drugs" (Benatar 646). According to the Global Burden of Disease Study 2010, tuberculosis killed 1.2 million people in 2010, and malaria caused 1.17 million deaths in the same year (IHME). Approximately 8.8 million children under the age of five died in 2008; 1.5 million of those deaths were preventable with vaccination (WHO). In an attempt to explain why the global burden of disease (GBD) falls mainly on the world's poor, many people point to local factors such as inadequate health infrastructure and the corruption of government officials in poor countries. However, it is important not to overlook global factors that contribute to the world's poor receiving the lion's share of the GBD, chief among them being the international laws governing pharmaceutical patents.

Thomas Pogge maintains that the current international pharmaceutical patent regime is unjust because it violates the human rights of the global poor by denying them secure access to medicines necessary for their health and survival. Pogge proposes the Health Impact Fund (HIF) as an addendum to the status quo that would help secure the basic human rights of the world's poor. To achieve this goal, the Health Impact Fund would offer pharmaceutical corporations the opportunity to register their medicines with the HIF, instead of applying for a traditional patent. HIF-registered medicines would receive payments based on their impact on the global burden of disease, which would encourage pharmaceutical corporations to research and develop medicines

that would primarily benefit the global poor. Given the option of supplementing the current pharmaceutical patent regime with the HIF, Pogge argues that it is morally impermissible to maintain the status quo.

Pogge anticipates three responses to his human rights-based argument. This paper will focus on Pogge's argument against the libertarian. The libertarian, according to Pogge, would defend the status quo by appealing to the natural property rights of pharmaceutical companies. In response, Pogge critiques the libertarian by arguing that intellectual property rights are inconsistent with libertarianism. However, this conclusion is counterintuitive and, for many libertarians, unsettling. In this essay, I show that Pogge fails to distinguish between two types of libertarian—status quo and revisionist—and that this distinction is necessary if Pogge wants to avoid the counterintuitive conclusion of his response to the libertarian.

Section II will briefly explain what the Health Impact Fund is, how it would work as an addition to the status quo, and why Pogge thinks it is preferable to alternative institutional reforms. Section III provides a summary of Pogge's human rights-based argument in support of the HIF. Section IV explains the libertarian's appeal to property rights as an objection to the human rights argument. Section V examines Pogge's response to the libertarian. Section VI locates the flaw in Pogge's argument with his failure to distinguish between status quo and revisionist libertarians. Finally, section VII anticipates two objections against my position.

II. THE HEALTH IMPACT FUND

The Health Impact Fund is not intended to completely replace the current system of intellectual property. Rather, the HIF would *supplement* the current system by providing pharmaceutical innovators with an alternative to conventional patents. According to this model,

"innovators could opt to register any newly patented medicine with the HIF, which would provide a guaranteed payment stream in proportion to the incremental impact of the innovative drug on GBD during its first 10-12 years on the market" (Ravvin 119). Establishing the HIF as a global institution could be accomplished by a coalition of affluent countries. Pogge estimates that "If governments representing one-third of global income agreed to contribute just 0.03 percent of their gross national incomes ($3 of every $10,000), the HIF could get started with $6 billion annually" (AHR 547). The reward payments, which would be distributed annually among innovators with HIF-registered products, would be funded primarily by affluent taxpayers in developed countries.

As Pogge explains, "Registrants would be rewarded not for selling their products, but for making them effective toward improving global health" (AHR 546). One way of measuring the impact on the global burden of disease is in terms of quality-adjusted life years (QALYs), which account for both the length and quality of human lives. Some insurance companies and national health systems already use this metric, meaning that the HIF should be able to adopt it with little difficulty. Under the HIF model, "The rate paid per QALY would be automatically determined through a division of the fund proportionally according to the number of QALYs gained by each drug registered with the HIF" (Ravvin 120). So the greater the impact of an innovation on the GBD, the more its innovator stands to gain from HIF rewards. Although measuring the QALYs added by a particular innovation would "necessarily be rough," the measurements would become more precise over time (AHR 547).

Pogge identifies three important consequences of creating the Health Impact Fund. First, the HIF would provide pharmaceutical innovators with incentives to develop medicines for diseases that largely affect the poor, but which are unprofitable to research and develop under the

current system. Pharmaceutical innovators would see the potential for profit in so-called "neglected diseases," and this new market would overlap with the health needs of the world's poor. Second, medicines registered with the HIF would be available at prices that the global poor can actually afford, unlike most medicines with traditional patents, which are sold at extremely high mark-ups in order to maximize profits and recoup money from research and development. In order to have the greatest impact on GBD possible, and thus maximize HIF reward payments, pharmaceutical innovators will have incentive to sell many of their products at prices below the lowest cost, which would increase the access of the global poor to essential medicines (AHR 549).

Finally, the Health Impact Fund offers a solution to the last mile problem, which is "the problem that effective drugs for the developing world often do not reach those who are in need of them and/or are not administered in a manner that maximize their impact on the disease burden" (ID 416). As Thomas Faunce explains, since innovators would strive to maximize the impact of their HIF-registered products on the GBD, they would "seek to ensure their medicine had maximum health impact through promoting the construction or improvement of healthcare systems to ensure that patients have the knowledge and motivation to use the medicines to optimal effect" (149). Although other reform plans promise to spur pharmaceutical innovation, few are able to incentivize direct improvements to poor country healthcare systems and infrastructure.

III. POGGE'S HUMAN RIGHTS ARGUMENT

Pogge's human rights argument is divided into two stages. In the first stage, Pogge adopts a human rights standard as a way to assess the justice of the status quo. He recognizes the

difficulty of showing the injustice of the current pharmaceutical patent regime without assuming that there is international agreement on a conception of global justice. The human rights standard addresses this difficulty, since the moral significance of human rights is widely acknowledged across nations and cultures. Human rights are minimal requirements, and Pogge is careful not to endorse the view that, so long as an action does not violate human rights, it is morally permissible. Rather, he maintains that "anything that does violate human rights is therefore impermissible" (*AHR* 552).

Human rights are generally understood as entailing certain duties, the content of which varies depending on how human rights are conceived. So-called positive duties to actively protect against human rights violations and to work towards realizing human rights are controversial and, as Pogge observes, likely to be rejected by many people in affluent countries. Pogge's human rights argument works with human rights narrowly conceived, "where the only duties these rights entail are duties to respect, that is, duties not actively to violate human rights" (*AHR* 553). Although Pogge himself does not understand human rights according to this narrow conception, his human rights argument follows this understanding so as to reach the broadest audience possible.

Pogge's conception of human rights is institutional, meaning that human rights should be understood, "primarily as claims on coercive social institutions and secondarily as claims against those who uphold such institutions" (*WPHR* 51).[1] On this narrow conception, human rights act as constraints on the actions of organized collective agents, such as governments or corporations, which prevent them from treating human beings in certain ways. Human rights violations may

[1] In contrast to an interactional understanding of human rights, which places constraints on the treatment of human beings without assuming social institutions exist. Pogge is particularly concerned with the constraints human rights place on governments.

involve direct action on the part of collective agents. For instance, a government might imprison and torture political dissidents, or silence a nosy journalist by threatening to harm her family. "In other cases," Pogge explains, "human-rights violating treatment is built into social rules, as when discriminatory burdens are imposed by law on certain minorities, or when a government policy systematically deprives some group of its livelihood" (AHR 553). In the case of the global poor's lack of access to essential medicines, Pogge is concerned with this second kind of human rights violation, since the poor's lack of access occurs through the social rules that govern the current pharmaceutical patent regime.

According to Pogge, human rights require that individuals have secure access to certain basic goods required for a "minimally worthwhile human life" (*AHR* 553). On his institutional understanding of human rights, individuals have claims on institutions to respect their right to these basic goods. Not only does this claim prohibit institutions from violating individual rights to the basic goods, it also requires that the rules governing society be designed in such a way that individuals have secure access to the basic goods—at least, to the extent that this is reasonably possible. It is up to governments to decide how to secure access to the basic goods, allowing for a wide variety of institutional schemes. The human right to secure access to the basic goods necessary for a minimally worthwhile human life applies on both the national and international level.[2] "Any institutional design," Pogge maintains, "is unjust if it foreseeably produces massive avoidable human rights deficits" (*WPHR* 25).

Having specified a conception of human rights, Pogge then asks whether the current international rules governing the development and distribution of pharmaceuticals violate human

[2] Unlike the national level, Pogge notes that it may be impossible on the international level to design institutions in such a way as to *actually* secure access to the objects of human rights. Given what we know about the interactions between states, Pogge explains, "it makes sense to require merely that the international order must be such that secure access *can* be fully realized" (*AHR* 554).

rights. With the adoption of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement in 1994, and subsequent TRIPS-plus provisions, the strong intellectual property rights (IPRs) of affluent Western countries were integrated into international trade law. Under TRIPS, the duration of pharmaceutical patent protection is twenty years, although patents typically have an "effective life" between ten and twelve years, as pharmaceutical companies tend to file for patents before clinical trials begin in order to secure the patent, protect against rival companies, and accelerate the review process (Muzaka 24-5). These new drugs are priced far beyond the reach of the poor to maximize profits for pharmaceutical companies during the twenty-year period of market-exclusivity, and to recuperate costs of research and development.[3]

Rochelle Dreyfuss explains, "In effect, patents act as a tax, putting treatment beyond the reach of all but the richest of the world's populace" (*IGPH* 36). Unable to afford many essential medicines, and without access to cheap generics, poor people lack access to the medicines they need—medicines that they likely would have had access to under the pre-TRIPS regime. Prior to the TRIPS Agreement, intellectual property rights were enforced on a state-by-state basis, with poor countries often having weak intellectual property protection (IPP), if any at all.[4] As Pogge observes, the lack of secure access to essential medicines under TRIPS is a primary reason why

[3] Pogge notes that, "When wealthy people really want a drug, then its price can be raised very high above the cost of production before increased gains from enlarging the mark-up are outweighed by losses from reduced sales volume. With patented medicines, mark-ups in excess of 1,000 per cent are not exceptional" (*IGPH* 139).

[4] India is often cited as an example of the deleterious effects of TRIPS on the world's poor. In India, the generic pharmaceutical industry was "one of the most successful in the world," providing many of the global poor with the essential medicines they needed to survive (Muzaka 35). In an editorial from 2005—the year most developing countries were required to implement the new TRIPS patent rules for pharmaceuticals—*The New York Times* noted that the "thriving and sophisticated copycat drug industry" is about to come to an end: "India's government has issued rules that will effectively end the copycat industry for newer drugs. For the world's poor, this will be a double hit - cutting off the supply of affordable medicines and removing the generic competition that drives down the cost of brand-name drugs" (*The New York Times*, "India's Choice").

"nearly all of the avoidable mortality and morbidity occurs in poor countries and especially among their poorest inhabitants" (*WPHR* 223).

According to Pogge, the current pharmaceutical patent regime violates the global poor's human rights "by undermining their secure access to health and survival" (*AHR* 555). The global institutional order, especially international trade agreements like TRIPS, foreseeably and avoidably contributes to poor country governments being unable to secure and protect the human rights of their citizens. Moreover, there are realistic reforms to the status quo that could be implemented in order to avoid, or at least mitigate, the human rights violations caused by the current pharmaceutical patent regime. Several different reform plans have been proposed, including advance market commitments (AMCs), priority review vouchers (PRVs), and the Health Impact Fund. It is worth briefly examining AMCs and PRVs to see how these reform plans compare with the HIF.

Advance market commitments incentivize the development of novel drugs by guaranteeing innovators that sponsors, such as governments or charitable organizations, will purchase vaccines developed to combat certain diseases. As Michael Ravvin explains, "An AMC would guarantee a predetermined price per treatment by supplementing the market price up to a certain number of treatments, on the condition that the treatments are sold at a fixed, affordable price" (118). Pharmaceutical innovators profit from AMCs not by charging a high price per drug as they do with the status quo, but by being the first innovator to develop a treatment for a disease identified by a sponsor. The sponsor's commitment ensures that the innovator recoups costs of R&D and makes a profit, allowing the vaccine to remain available at an affordable price after the AMC has been fulfilled.

Priority review vouchers offer pharmaceutical innovators the opportunity to expedite the US Food and Drug Administration (FDA) review process. On the PRV model, "a pharmaceutical company that obtains approval for a drug or vaccine against a specified neglected disease will receive a voucher for priority FDA review of another pharmaceutical" (Ravvin 117). The average time for the FDA to review a drug is 18 months, but an innovator with a priority review voucher could cut FDA review time down to 6 months (ID 414). The extra year of market exclusivity afforded by the PRV is worth hundreds of millions of dollars in sales, so pharmaceutical innovators will be driven to develop medicines to treat the specified neglected diseases. In this way the PRV system benefits the global poor, but it also provides the wealthy with faster access to blockbuster drugs, as pharmaceutical companies will use their vouchers on drugs targeted at the developed world in order to maximize their profits.[5]

The existence of viable reform plans shows that governments cannot appeal to the necessity of intellectual property as an incentive for pharmaceutical innovation. Although it is often claimed that patents provide pharmaceutical companies with necessary incentives to develop drugs that would otherwise not be profitable to produce, this is not necessarily the case. As Valbona Muzaka notes, "IPRs are not necessarily the only or even the most effective way of providing incentives for innovation and creativity" (22).[6] Pogge concludes that a reform to the pharmaceutical patent regime, such as the HIF, "is morally required for the sake of realizing the human rights of the global poor" (*AHR* 556).

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[5] The European Commission defines a blockbuster medicine as "one which achieves annual revenues of over US $1 billion at global level (17).

[6] Muzaka elaborates, "Indeed, they may actually stifle innovation by reducing the incentives for IPRs holders to progress and compete in the market through other means, by making knowledge more expensive for others to use, or by unnecessarily reducing the pace of progress in general" (22-3).

Pogge favors the Health Impact Fund as a complement to the status quo because other reform plans, including AMCs and PRVs, have flaws that make them less effective at securing the basic human rights of the world's poor. Advance market commitments may incentivize pharmaceutical innovation but, unlike the HIF, they do not offer a solution to the last mile problem. Sponsors encourage the development of new medicines, but they do not guarantee that a new drug will reach the people who need it, or that it will be properly used when distributed. Priority review vouchers share this flaw. PRVs provide innovators with the incentive to develop drugs specifically for neglected diseases, but they do not spur innovators to ensure that the global poor actually have access to them. The Health Impact Fund, on the other hand, promises both availability of and access to essential medicines for the global poor.

There are also practical problems faced by AMCs and PRVs, which are not shared by the Health Impact Fund. For instance, AMCs require a high degree of specificity, which "is problematic because it presupposes the very knowledge whose acquisition is yet to be encouraged" (IGPH 194). Without this knowledge, sponsors are likely to be overly demanding or not demanding enough. Either the specifications are too rigorous, causing innovators to give up before developing the target drug, or they are not rigorous enough, allowing innovators to produce an inferior product that nevertheless meets the sponsor's specifications. Although the HIF is not without obstacles to its implementation, Pogge maintains that they can be overcome, unlike some of the flaws in AMCs and PRVs.[7]

In the second stage of the human rights argument, Pogge explains and responds to three objections, each of which appeals to a morally relevant consideration meant to override the

[7] For example, see Pogge's, Peterson's and Hollis' response to Jorn Sonderholm's critique of the HIF, "A Critique in Need of Critique," in *Public Health Ethics* Vol. 3 No. 2, 2010: 178-185.

human rights argument. This paper will only focus on the last objection, the libertarian appeal to property rights, to which I now turn.

IV. THE LIBERTARIAN APPEAL TO PROPERTY RIGHTS

Rooted in the Lockean tradition, the libertarian response to Pogge's human rights argument "is characterized by the endorsement of strong rights to freedom and property" (*AHR* 559). The libertarian advances two claims in response to Pogge. First, the libertarian argues that, on an appropriately narrow understanding of human rights, property owners who refuse to share what they own do not actively violate the human rights of poor people, even in the case of essential medicines. Second, the libertarian argues that human rights do not require affluent people to develop, or pay for the development of, medicines that the poor need to survive. In both cases, the libertarian maintains that no active violation of human rights occurs, and so the actions of the property owners and the affluent are morally permissible.[8] In the next section, the libertarian's first claim will be explained in detail.

The Libertarian Argument

According to the libertarian, individuals have a strong right to private property. So long as they do not infringe on other individuals' rights, property owners have the right to use their property as they see fit. They may share their property with others, but they also have the right to refuse to share their property, even in cases where other individuals require their property in order to satisfy human rights. Property owners also have the right to protect their property from

[8] Of course, the libertarian acknowledges that, in both cases, no help is being given to the poor. But this is not a problem on a narrow conception of human rights, where the only requirement is to respect—i.e. not actively violate—human rights.

those who would try to claim it as their own, and to give others (e.g. the state) permission to protect it on their behalf. "In this way," Pogge explains, "the creation and enforcement of legal property rights can be defended" (*AHR* 560). The libertarian maintains that these legal property rights in tangible objects also apply to intellectual property.[9] Innovators, including pharmaceutical companies, have a right to refuse to share their innovations, including new essential medicines, with others. Moreover, they may take steps to protect their innovations, and the current pharmaceutical patent regime is one such method of protecting their intellectual property rights to the medicines they create.

Pogge is quick to note that, in the case of pharmaceuticals, this reasoning is circular. The TRIPS Agreement established international legal property rights that did not exist prior to the adoption of the agreement in 1994. "The creation of these new property rights," explains Pogge, "cannot be defended by appeal to these same legal property rights" (*AHR* 560). The only way for the libertarian defense to succeed, according to Pogge, is to appeal to natural property rights. On this understanding, legal rights to property would have their basis in, and be justified by, a natural right to property, thereby avoiding the circularity problem faced by the previous articulation of the libertarian defense. Jorn Sonderholm notes that this natural property right allows libertarians to "see trade agreements such as TRIPS as a legitimate legal enforcement of a pre-existing natural/moral right" (EI 1111).

Pogge considers Robert Nozick, who has justified the exclusion of poor people from essential medicines, as an example of a libertarian appeal to natural property rights. On Nozick's view, individuals have a natural right of appropriation. As Sonderholm explains, "This is the idea that any innovator/worker who mixes her labor with a previously unowned object or natural

[9] Tom Palmer refers to this defense of intellectual property as the "piggy-back" theory, because "The intellectual property right obtains its moral force from its dependence on a more conventional right of property" (*AP* 820).

resource comes to own this object or resource in full and can legitimately deny that other people use/appropriate this object or resource" (EI 1111). The natural right of appropriation is limited by a proviso taken from Locke, which states that the appropriation of unowned resources is allowed provided that one leaves "enough and as good" for others.[10] Exactly how to interpret the Lockean proviso is a subject of debate, but Nozick's view represents one possible reading. In the case of pharmaceuticals, as Pogge notes, since producing drugs tends not to require many ingredients, the Lockean proviso is met on any reasonable interpretation.

According to Nozick, a medical researcher who develops a new medicine that others need has a right to sell the medicine at whatever price he chooses, or to withhold the medicine from others altogether. Nozick reasons, "The others easily can possess the same materials he appropriated; the researcher's appropriation or purchase of chemicals didn't make those chemicals scarce in a way so as to violate the Lockean proviso" (181). The same holds for pharmaceutical corporations and the medicines they produce. In this case, the individuals employed by pharmaceutical corporations mix their labor with unowned resources to produce medicines. However, these individuals give up rights to their innovations through the contracts they sign with the pharmaceutical corporations by whom they are employed. So, like individuals, pharmaceutical corporations are entitled to the medicines they develop and produce, even though the human rights of the global poor remain unsatisfied as a result.

V. POGGE'S RESPONSE TO THE LIBERTARIAN

Pogge argues that Nozick's example of the medical researcher is not analogous to the current pharmaceutical patent regime. In Nozick's example, pharmaceutical corporations would

[10] It is worth noting that Locke did not actually defend intellectual property, although his theory of tangible property is often extended to intangibles (*CF* 3).

have a right to the physical medicines they develop and produce, provided that they do not violate the Lockean proviso. The difference between Nozick's example and the current pharmaceutical patent regime, according to Pogge, is that "In the real world, innovators assert not merely *physical* property rights in product *tokens* they create, but also so-called *intellectual* property rights in abstract product *types* as well" (*AHR* 562).

To illustrate, suppose an innovator creates a new medicine to treat tuberculosis. In addition to the physical property right to each pill she produces, under the current pharmaceutical patent regime, she may also claim a right not to have her innovation reproduced without her consent. The innovator's intellectual property right acts as a constraint on others' physical property rights in that it prevents them from using their own property in certain ways. Specifically, the innovator's intellectual property rights prevent others from using their resources to reproduce the exact same tuberculosis medicine she created. So, if the innovator's tuberculosis medicine is composed solely of ingredients XYZ, then no other individuals may use their own ingredients XYZ to duplicate the IP protected product.[11] For the duration of her patent, the innovator has the sole right to produce and sell tuberculosis medicines composed of XYZ.

However, as the above example makes clear, intellectual property rights appear inconsistent with libertarianism. On the one hand, the libertarian endorses strong rights to freedom and property. But on the other hand, the innovator's intellectual property rights restrict the physical property rights and freedom of others by preventing them from using their own property as they see fit. According to Pogge, this inconsistency leads to a "surprising conclusion," namely that "Libertarian thought does not merely fail to vindicate intellectual

[11] The innovator may also have exclusive rights to the process she used to create her tuberculosis medicine. Typically, innovators file for and receive *process* patents, which protect the means by which an innovation is produced, in addition to *product* patents that protect the composition of the innovation itself (Muzaka 25).

property rights but actually condemns them" (*AHR* 564). If Pogge is right, then *any* intellectual property regime is incompatible with libertarianism.

VI. CRITIQUE OF POGGE

Pogge's response poses a serious problem for the libertarian defender of intellectual property. As Sonderholm explains,

> If Pogge is right that the libertarian argument in favor of IPRs can only yield the conclusion that innovators have property rights to the physical token of their innovation, then libertarians seem to be committed to the view that an author has only a property right to the physical token of the book she is writing and not any copies of it. (EI 1114)

Presumably, many libertarians would find Pogge's conclusion unpalatable. To maintain that an author does not own the idea for her story, but merely the physical pages on which it is written, seems counterintuitive and, prima facie, absurd. Something is wrong with this picture—either libertarianism has gone astray, or Pogge's human rights argument rests on a misunderstanding.

In what follows, I identify the flaw in Pogge's argument with his failure to distinguish between *status quo* and *revisionist* libertarian positions on intellectual property. Since Pogge does not distinguish between these two libertarian positions, his critique of libertarianism leads to his counterintuitive conclusion that intellectual property rights of any kind, including the author's right to her story, are incompatible with libertarianism.

The Status Quo Libertarian

According to the status quo libertarian, the current system of international IPP is entailed by strong natural rights to private property. Pogge is right to reject this version of libertarianism. However, the ground on which Pogge rejects the status quo libertarian is flawed—libertarian accounts are not necessarily inconsistent with intellectual property rights. The reason to reject the status quo libertarian is because she conflates a natural right to intellectual property with current IP laws, when the two are not the same thing. To illustrate this point, consider the history of the current system of international IPP, which goes far beyond what a commitment to IPRs requires.

Even if we grant that the libertarian's endorsement of strong natural property rights can be extended to intangibles—a position that the status quo libertarian maintains, but that many libertarians today do not hold—it does not seem like the current system of IPP is necessarily entailed by strong natural property rights.[12] For instance, James V. Delong explains that some libertarian skeptics "would not allow a creator to invoke the legal power of the state to exclude others from using his creation…Their objection is not so much to the idea of intellectual property as it is to the use of state power to enforce it" (*CF* 17). International intellectual property protection, after all, was not universally mandated and enforced until TRIPS, and the natural rights defense of IPRs can be traced back far earlier.[13]

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[12] Stephan Kinsella elaborates: "Libertarian views on IP range from complete support of the fullest gamut of IP imaginable, to outright opposition to IP rights" (8). Kinsella himself, for instance, argues against intellectual property, whereas Randian libertarians appeal to natural rights to defend IPRs. While all libertarians emphasize the importance of property rights, their position on IPRs—and even the content of intellectual property itself—dramatically varies.

[13] For example, see Lysander Spooner's *The Law of Intellectual Property: or An Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas"* (1855). Spooner gives a natural rights defense of intellectual property, and this text marks the first time the term 'intellectual property' was used in print (May and Sell 18). An anarchist, Spooner argued that the government's sole economic function should be "to protect the rights of each and every individual to acquire all that he can acquire and to dispose completely at his own volition of whatever property he may have acquired" (Blau 254).

The historical origins of intellectual property rights make it clear that a natural rights defense of intellectual property is distinct from, and does not entail, the current legal means of securing IPP. Tom Palmer explains that, "Monopoly privilege and censorship lie at the historical root of patent and copyright" (*IP* 264). For example, the stringency of American IP law, which undoubtedly had a significant impact on how TRIPS was formulated, can be traced back to the English system of intellectual property protection. Under the English system, "Patents for new inventions were issued by the English Crown with the aim of raising funds through the granting of monopolies or of securing control over industries perceived to be of political importance" (*IP* 264). Today, patents still function as monopolistic privileges, although they are rarely described in such terms. The political importance of patents was the chief reason that industrialized countries instituted patent systems during the nineteenth century. As Peter Dietsch explains, "In an increasingly protectionist international climate, patents were seen as a safeguard against foreign competition" (*IPTJ* 232).

The strong IPP of international intellectual property law is not entailed by the status quo libertarian's natural rights defense of IP. It is the result, not of logical deduction from the libertarian idea of a natural right to property, but rather the product of political lobbying by developed countries such as the United States and members of the European Union, who pushed for strong international IPP during the Uruguay Round. The tension that Pogge identifies between libertarianism and intellectual property is a direct result of how the current international intellectual property laws are defined, implemented, and enforced—not an inherent feature of libertarianism. Libertarians need not defend or endorse the current pharmaceutical patent regime. In fact, a libertarian is likely to agree with Pogge that the status quo is unjust. But a libertarian would not accept Pogge's normative principles. Instead of maintaining that the status quo is

unjust on the basis of human rights deprivations, a libertarian could argue that the current pharmaceutical patent regime is unjust because it infringes on individuals' natural rights to property and on their freedom.

The Revisionist Libertarian

The tension between strong physical property rights and intellectual property rights is a legitimate concern for libertarians, and perhaps it is this tension that has caused many libertarians to abandon the pro-IP ship. However, this tension is not, in and of itself, enough to show that libertarianism is necessarily inconsistent with intellectual property rights. Contrary to what Pogge argues, the tension between a strong natural right to tangible property and intellectual property protection only shows one thing: that intellectual property rights, *in any form that allows innovators control over all physical tokens of their innovation type*, are inconsistent with libertarianism. And this view, as noted above, is only a problem for the status quo libertarian. The revisionist libertarian, on the other hand, proposes an alternative system of IPP that is consistent with the libertarian values of freedom and rights to tangible property.

Jonathan Trerise argues in favor of a system of IPP called Weak-Type Protection (WTP). He explains WTP as "the view that one has ownership over one's original token(s), as well as a claim right on the *rivalrous uses of copies* of one's original token(s)" (*IPTJ* 124). Trerise maintains that a WTP system of intellectual property protection is preferable to Strong-Type Protection systems, like the current pharmaceutical patent regime, which he believes are unjustified because of their infringements on individual liberty. A rivalrous use of an object occurs when someone uses the object such that the availability or value of the object to another person is reduced. For instance, my use of an acre of land is rivalrous because it prevents others

from using that land. However, my use of the wind to fly a kite is non-rivalrous, since others may use the same resource for their own purposes. The advantage of WTP is twofold:

> WTP allows one to own ideas in that others are not free to copy and profit from those copies, thereby impacting your ability to make a profit. WTP also does not, in contrast to STP, restrict one's ability to make independent and yet qualitatively identical items; that is, WTP regards the *causal history* of putative copies as relevant to determining their status as ownables. (*IPTJ* 124)

In the case of pharmaceuticals, a WTP system of intellectual property protection allows pharmaceutical innovators to profit from their innovations, as they retain weak-type rights over their innovations. However, a WTP system does not absolutely prohibit others from making and using copies of the innovation. Innovators who independently arrive at the same innovation have no claim against one another under a WTP system.

A WTP system of intellectual property is, I maintain, an example of a system of IPP that can be endorsed by the revisionist libertarian. Under a WTP system, if I were to invent a vaccine for Chagas disease, I would have intellectual property rights to this vaccine type, as well as physical property rights to each vaccine token I produced. However, I would be unable to prevent others from producing, owning, and using their own vaccine tokens for Chagas disease, even if they directly copied my vaccine. The only restriction I could place on others would be to prohibit rivalrous uses of their tokens of my Chagas disease vaccine. Primarily, this restriction would prohibit others from *directly* copying (e.g. through reverse engineering) and selling my vaccine, since that would reduce the value of my vaccine. But it would not prohibit an individual

from selling the Chagas disease vaccine she created independent of my vaccine, even if the two were identical.[14]

One might argue that anyone who uses their own tokens of my Chagas disease vaccine, for whatever reason, is subject to the rivalrous use restriction. For instance, if Susan directly copies my Chagas disease vaccine type and stores a token of it in her medicine cabinet, in the event that she may need it someday, Susan has deprived me of a potential sale. Worse still, Susan's ingenuity may inspire others to do the same, costing me more sales over time. But if that's the case, then either the availability or value of my own Chagas disease tokens would have to be reduced, according to Trerise's definition of rivalrous use. In the case of medicines, it seems unlikely that Susan's production of Chagas disease vaccine tokens would reduce the availability of my Chagas disease vaccine tokens. Since medicines typically meet the Lockean proviso, there ought to be enough resources for both of us to produce our own Chagas disease vaccine tokens, even if we both produce them in large quantities.

But does Susan's production of Chagas disease vaccines reduce the value of my own Chagas disease tokens? The answer to this question depends on what Susan does with her Chagas disease vaccine tokens. If she gives them away in large quantities or sells them for less than I do, then she reduces the value of my vaccine tokens by flooding the market with free or cheap Chagas disease vaccines, thereby forcing me to sell my vaccine tokens at a lower price. Both of these uses are rivalrous on Trerise's account. But if she merely produces Chagas disease vaccine tokens for her own personal use, then it is hard to see how she has significantly reduced

[14] Although such instances are likely to be uncommon, a clear definition of "independent creation" would need to be established in order to put a WTP system into practice. A starting point might be something like the following: for any two similar innovations X and Y, X was created independently of Y if and only if a) X's creator did not directly copy Y or Y's production process (e.g. by reverse engineering), b) X's creator did not knowingly incorporate elements of Y into X (e.g. by copying Y's design or using the same materials), and/or c) X was unaware of Y's existence.

the value of my own vaccine tokens. Although she is not buying my vaccines, her personal production and use does not significantly reduce the price at which I can sell my Chagas disease vaccine tokens to other people, because aggregate demand is only diminished by a small degree. Even if she inspires others to do the same, the specialized equipment and knowledge required to produce pharmaceuticals creates a technological fence that prevents most individuals from following in her footsteps. So in this case, it seems like her use is non-rivalrous.[15]

Furthermore, on a WTP system I would have no claim against someone who, inspired by my Chagas disease vaccine, created and sold her own vaccine type, even if it bore a striking similarity to my vaccine. Instances of "creative inspiration," as Trerise notes, would be the most difficult kind of case for WTP to handle. It does not seem that this difficulty would prove insurmountable, though, since the current international IPP regime is far more complicated than a WTP system, and it manages to deal with similar difficulties. Although I would not have a right to market-exclusivity under a WTP system, I would still have intellectual property rights to my vaccine type, since I mixed my labor with materials I fairly appropriated.[16] Of course, a WTP system like Trerise's would need to be fleshed out in considerable detail before being implemented in the real world, but this brief sketch is enough to show how such a system would operate, and to prove that libertarianism can generate intellectual property rights *and* endorse strong natural rights to physical property.

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[15] Although I have tried to distinguish these two cases, one may respond that Susan's use of her Chagas disease vaccines in the latter case does in fact constitute a rivalrous use of my original token on Trerise's account. I do not have room to fully consider such a response here, but it is sufficient to note that a robust account of rivalrous usage would be required for a WTP system to be implemented in the real world.

[16] This weak-type IPR would allow me to recoup the costs of my research and development and, like physical property, I would presumably have the right to sell the patent to my Chagas disease vaccine to another person, although Trerise does not specifically address this topic.

The freedom this system allows would have a significant impact on the world's poor. Under a WTP system, non-governmental organizations would be permitted to produce and distribute essential medicines to the poor, so long as they did not impact the ability of pharmaceutical corporations to make a profit. To avoid taking profits from patentees, NGOs might, for example, require recipients of medicines under patent to prove that they are unable to pay the market price for medicines. With increased access to essential medicines, the global poor would enjoy greater human rights protection under a WTP system than under the status quo. So by Pogge's own normative principles, a WTP system of intellectual property is a plausible alternative to the Health Impact Fund.

VII. OBJECTIONS

In what follows, I will anticipate two objections to the system of IPP that I describe. First, Pogge may press on my claim that a WTP system of intellectual property protection is consistent with libertarianism. Second, pharmaceutical corporations and other defenders of the current international IP regime may argue that a WTP system would encourage less innovation than the status quo. Since less innovation would result in fewer new medicines being brought to market each year, a WTP system would be worse than the status quo and should not be implemented. Although Pogge is unlikely to make this second objection, it is important to respond to it here to show that the WTP system is a viable system of IPP.

Pogge's Inconsistency Objection

Pogge may make the following challenge in response to the WTP system I have presented. He might argue that, even though a WTP system violates individual rights to freedom

and property *much less than* the current intellectual property regime, such a system is still inconsistent with libertarianism. Under a WTP system, an innovator has claims against rivalrous uses of her innovation type, which means that she is able to prohibit other individuals from doing certain things with their own property. The original question Pogge poses to the libertarian—how can innovators have the right to unilaterally prohibit others from using their own property in certain ways within a libertarian framework?—could be posed to libertarians who endorse a WTP system as well. It is not possible, according to Pogge, for libertarians to both endorse strong physical property rights *and* support a WTP system of intellectual property protection, under which innovators have limited control over the property of others. Any such unilateral limitation on individual rights to freedom and property is enough to show that libertarianism is inconsistent with intellectual property rights.

In responding to this objection, it is crucial to keep in mind that the libertarian does not endorse absolute, unrestricted individual property rights. If the libertarian defended absolute property rights, she would be committed to the claim that *any* limitation of one's property rights is unjust. However, the libertarian recognizes that an individual's right to property can be restricted under certain circumstances. The following two cases serve to illustrate this point.

One situation in which the libertarian recognizes limitations on property rights occurs when an individual's property rights conflict with or violate the rights of another person. For instance, my property right to my collection of baseball cards is limited by the fact that I cannot store them in my neighbor's house without his permission. My neighbor has the right to permit or deny entry to visitors, to decorate the house as he sees fit, and to decide what objects go inside his house, among other things. To move my baseball card collection into his house without authorization would violate my neighbor's property rights, since owning his house makes him

the sole arbiter of how it is used. In this case, the libertarian would not say that my property rights are being unjustly restricted, as we would expect if the libertarian endorsed absolute, unrestricted rights to property. Rather, my property rights simply do not extend so far as to allow me to transgress my neighbor's rights to freedom and property. My neighbor's property rights, in other words, trump my own.

The libertarian also recognizes that property rights can be limited, to a certain extent, through contract.[17] In exchange for a monthly rate of pay, my neighbor may allow me to store my baseball card collection in his house for one year. In such a case, he would be unable to do certain things with his property for the duration of the contract, like sell his house without providing that the new owner honor the contract with me. Moreover, the contract may give me certain rights to his property—for example, the right to enter his house without permission to check on my card collection—that I would not normally possess. As in the previous case, the libertarian does not view this restriction of rights as unjust. The rights to contract and freedom allow my neighbor to accept a limitation of his property rights in exchange for a monthly payment.

What these two examples show is that the libertarian's endorsement of strong property rights does not preclude certain limitations from being placed on an individual's right to property. That being the case, it is unclear to me why we ought to think that the libertarian framework is inconsistent with the limited restrictions to property rights that a WTP system requires. The revisionist libertarian may offer two responses to Pogge, in keeping with the two cases considered above. First, she may argue that the rights of innovators trump those of other

[17] According to some libertarians, one cannot permanently give up one's right to property through contract. Less severe limitations, like forfeiting the right to one's innovation through a contract with one's employer, are permissible within a libertarian framework.

individuals. So, when an innovator prohibits others from doing certain things with their own property, no rights are being unjustly restricted. Second, she may argue that individuals can accept the limited property restrictions that a WTP system places on them, in voluntary exchange for intellectual property protection and the benefits that IPP brings. It seems likely that the global poor would consent to a WTP system of intellectual property, given the increased access to essential medicines it would afford them. As discussed in the next section, there is reason to think that weaker IPP would allow for more innovation, leading to new and improved medicines and possibly higher profits for pharmaceutical corporations. Increased innovation and the availability of new medicines would give the rich reason to accept a WTP system as well.

Decreased Innovation

In order to be compatible with libertarian property rights, any system of intellectual property protection must be significantly weaker than the status quo. But any system of IPP that is significantly weaker than the status quo, some might argue, would provide pharmaceutical corporations with less incentive to innovate. Pharmaceutical corporations will be reluctant to research and develop new medicines without the tremendous financial benefits secured through strong IPP. Since a WTP system would have the undesirable effect of encouraging less innovation, it is not a viable alternative to the status quo.

If this second objection is successful, my response to Pogge would lose some of its force. If a WTP system is not an alternative to the status quo, we might wonder why the revisionist libertarian would endorse it. In other words, the revisionist libertarian wants a system of IPP that is both consistent with libertarian principles *and* capable of being realized at the global level. If a WTP system cannot be implemented in the real world, then the revisionist libertarian is under

pressure to devise an alternative IPP scheme that is feasible. In what follows, I will respond to this objection.

Defenders of the status quo often claim that strong intellectual property protection is necessary in order to promote innovation, but we ought to treat such claims with suspicion. The empirical support for the necessity of strong IPRs for innovation is dubious at best, and altogether lacking at worst. It is also unclear whether this alleged increase in innovation leads to an overall increase in wealth.[18] As Palmer explains, "That markets for ideal objects can and do function in the absence of enforceable intellectual property rights is demonstrated by the fact that many innovations that are not accorded copyright or patent protection are nevertheless produced on the market" (*IP* 287). Alternatives to strong IPP, such as technological fences and contractual agreements, can be used to prevent intellectual property from rivalrous use and promote innovation.

To illustrate, consider that although article 27 of the TRIPS Agreement states that member states *may* exclude from patentability surgical methods for treating humans, there is still incentive to develop new methods for surgery on humans and animals (WTO 331). Hospitals and universities have incentive to develop new surgical techniques, despite lacking guaranteed patent protection, because such techniques are useful. The advanced medical equipment and training required to perform surgery serve as obstacles to the widespread dissemination and subsequent loss of value of surgical techniques. Industries like fashion and advertising also lack strong IPP, but continue to innovate through other means. With this in mind, we might ask whether strong IPRs are necessary for pharmaceutical innovation in particular.

[18] Kinsella, in response to this utilitarian line of thinking, points out that "Econometric studies [of patents and copyrights] do not conclusively show net gains in wealth" (14).

If it were true that strong IPRs are necessary for pharmaceutical innovation, we would expect the number of innovative drugs on the market to rise as the strength of IPP increases. In reality, we find the opposite—intellectual property protection has increased over the past few decades, yet the number of new molecular entities reaching the world market has steadily declined since the 1960s (Muzaka 26). Sigrid Sterckx offers one explanation for this decline in innovation: "the greater part of pharmaceutical R&D budgets is spent on 'me-too' drugs—drugs that are slightly altered (and hence not innovative) versions of existing success products" (181). By focusing on "me-too" drugs, pharmaceutical corporations can create and enforce patent monopolies for a profit.[19]

Some scholars even argue that strong IPP actually suppresses innovation. Jillian Cohen and Patricia Illingworth, for example, maintain that "Patents impede progress in technology by precluding other firms from cross-learning and building on the original innovation" (32). Moreover, many pharmaceutical corporations pursue patents for the sole purpose of impeding competitors' innovative efforts. These so-called patent thickets are "multiple and overlapping patent rights that require those seeking to commercialize new technology to obtain licenses from multiple patent holders" (May and Sell 26). Patent thickets discourage innovation by increasing the cost of pharmaceutical R&D, which exceeds $65 billion per year in the US alone (Merges 283). So, claims about the necessity of strong IPRs for pharmaceutical innovation ought to be treated with skepticism.

[19] Pharmaceutical corporations, on the other hand, maintain that the decline in pharmaceutical innovation can be attributed to the fact that most of the obvious new molecular entities having already been discovered.

VIII. CONCLUSION

This paper has identified the flaw in Pogge's human rights argument with his failure to distinguish status quo and revisionist libertarianism. Although Pogge rejects status quo libertarianism, he does so for the wrong reasons. Consequently, Pogge arrives at the counterintuitive conclusion that libertarianism is necessarily inconsistent with intellectual property rights of any kind. But, as the revisionist libertarian position shows, it is a mistake to maintain that libertarians cannot generate IPRs and endorse strong natural rights to property, as a WTP system of intellectual property shows that the libertarian values of freedom and property are not necessarily inconsistent with IPRs. The WTP system, I maintain, is a libertarian alternative to Pogge's Health Impact Fund. Pogge has considered and rejected other reform plans, including advance market commitments and priority review vouchers, but he has not addressed the possibility of a WTP system. In order for his HIF proposal to move forward, Pogge must offer a response to the revisionist libertarian.

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