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Is There a Human Right to Essential Pharmaceuticals? The Global Common, the Intellectual Common, and the Possibility of Private Intellectual Property

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Abstract: I argue that there is a human right to vital pharmaceuticals, not in the sense that anybody has a claim right to the provision of pharmaceuticals that are not yet available, but in the sense that access to pharmaceuticals must not be limited by means of overblown private intellectual property right. Contrary to what is customary, my argument in support of such a human right draws on foundational considerations about intellectual property. My analysis is to some extent driven by exploring parallels between a Global Common and an Intellectual Common, to both of which all of humanity would have symmetrical ownership rights.

1. To the extent that this is a matter of law, one can make a case that there is a human right to vital pharmaceuticals, such as those on the World Heath Organization's list of essential medicines. Yet while lawyers explore what such a right amounts to and if it conflicts with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), our concern is to explore if philosophical approaches to human rights deliver a right to pharmaceuticals -- specifically, if there is such a right according to a conception I have recently offered, which regards human rights as membership rights in the global order, where one basis for membership is humanity's collectively owning the earth.[1]

[1] Many thanks to audiences in my human rights class at the Harvard Kennedy School, at the Department of Political Science at the University of Utah, and at the Program in Ethics and Health at Harvard, where I presented this material in November 2008. Thanks also to Norman Daniels, Nir Eyal, and Dan Wikler for helpful exchanges. Hestermeyer (2007) sums up the state of the art in the legal debate; see also Toebes (1999). Sell (2003) discusses the background to TRIPs and the history of intellectual property arrangements. See Maskus and Reichman (2005a) on general developments in intellectual property protection at the global level. The WHO's lists of essential medicines is at http://www.who.int/topics/essential_medicines/en. For my conception of human rights, see Risse (2009a), Risse (2009b) and Risse (forthcoming). I take the *concept* of human rights to refer to rights that are

In a nutshell: Yes, there is a human right to essential pharmaceuticals. Yet we must be careful in assessing precisely what kind of right this is. My argument does not deliver a right that anybody provide pharmaceuticals that are not generally available, or not yet available at all.[2] Instead, I show that it is owed to people across the world that intellectual property generally and vital pharmaceutical in particular not be regulated in a way that acknowledges far-reaching private intellectual property rights – especially at the global level. In that sense, there indeed is a human right to pharmaceuticals.

My conclusions follow from reflections on the possibility of private intellectual property, rather than a more customary appeal to more foundational rights to welfare or health (care). Therefore much of what I argue should be useful even to those who reject my conception of human rights.[3] The question of what support there is for a right to vital pharmaceuticals arises separately for each conception of human rights. Addressing it within the confines of my conception should be of particular interest since considerations

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invariant with respect to local conventions, institutions, culture, or religion. I take it that the focus of the human rights language is on abuses committed by those in positions of authority: of two otherwise identical acts one may be a human rights violation, but not the other, depending on whether they can be interpreted as abusing authority. (On this, see Pogge (2002), pp 57 ff.) A *conception* of human rights adds contents to the concept, and consists of four elements: First, a list of these rights; second, an account of the basis on which individuals have them (i.e., of what features turn individuals into rights holders); third, an account of why that list has that particular composition, that is, a principle or process that generates it; and fourth, an account of who has to do what to realize these rights, that is, an account of the corresponding obligations. The universality captured by the concept of human rights and our human rights practices render it implausible that there is a single philosophically most sensible conception of human rights. As I explain below, my conception has some virtues, but also shortcomings, in terms of its ability to capture human rights discourse.

[2] To that end, the argument of this study can interact effectively with work on incentive-setting for the pharmaceutical industry, see Kremer and Glennerster (2004) and Pogge (2008a) and (2008b).

[3] My argument is indeed made complex by the fact that I am primarily exploring the subject matter of this essay from the standpoint of my conception of human rights. What should be of general interest is (a) the parallel between the Global Common and the Intellectual Common, and (b) my argument for constraints on the extent of private intellectual property rights that in turn ends up being *independent* of any ontological characterization of the objects of intellectual property law (in terms of an Intellectual Common or any other manner) and thus holds at considerable generality.

of collective ownership play an important role in both that conception and the debate about the possibility of private intellectual property. While reflections about a *Global Common* are at the core of my conception, reflections about an *Intellectual Common* inform debates about intellectual property. An exploration of how these approaches interact underlies the subsequent discussion throughout.

I proceed in three steps. First (in sections 2-5), I establish the link between human rights and collective ownership. Individuals possess a set of natural rights that characterize their status as co-owners. The existence of sates puts these rights in jeopardy, and a set of associative rights must ensure states preserve these natural rights. These associative rights provide us with a conception of human rights, such rights being membership rights in the global order. The standpoint of collective ownership serves as one basis for deriving these rights. While this view may strike many as missing the point of human rights, it has its virtues: it rests on foundations that should be universally acceptable; can show why the language of "rights" rather than goals is apt here; and entails a global responsibility for these rights. That humanity collectively owns the earth was a predominant idea in 17th century political philosophy: Grotius, Hobbes, Pufendorf, Locke, and others debated how to capture this status and the conditions under which parts of the Global Common can be privatized.[4] Although these views were religiously motivated, we can revitalize this standpoint non-theologically. Doing so is sensible in light of all those problems of global reach that have recently preoccupied us.

One area where an idea of collective ownership has had an impact is intellectual property, which leads to the second step of my argument (sections 6-8). Just as there is a

[4] See Buckle (1991) and Tuck (1999) for these discussions.

Global Common, so the set of ideas may form an Intellectual Common. Those who "have" ideas are then not inventors or creators, but explorers or discoverers. What claims to controlling the use of ideas there can be would have to be assessed in light of the point that such ideas originally belong to a Common. This approach draws on Locke's discussion in Chapter V of the *Second Treatise*, a discussion so influential in theorizing about property that Drahos (1996) assigns to it "totemic status" (p 41). In that chapter, Locke merges his account of collective ownership with a labor-based ("mixing") approach to privatization. Since many commentators have thought they transfer readily to intellectual property, Locke's ideas have inspired a particular approach to intellectual property in terms of an Intellectual Common. Rather than Locke, however, my effort to revitalize the standpoint of collective ownership appeals to Hugo Grotius.

Like no other work in the philosophy of international relations, Grotius' *De Jure Belli ac Pacis Libri Tres* (DJB), *Three Books on the Law of War and Peace*, published in 1625, makes ownership of the earth central to the relations among both individuals and political entities. Grotius' concern is with the "differences of those who do not acknowledge one common Civil Right whereby they may and ought to be decided" (I.1.I), differences he seeks to regulate non-parochially. By making collective ownership central, Grotius formulates a version of a standpoint of what one may call global public reason. I develop the first step of my argument from a Grotian standpoint, although it matters little whether we choose a Grotian or, say, a Lockean starting point there. I take a Grotian starting point for the second step too, but now the Grotian origins matter.

Grotius is best known for his views on the freedom of the seas. Throughout his writings, he argues in different ways that the seas cannot be owned. Assessing his

arguments leads to reflections about the conditions under which anything that is originally collectively owned can be privatized. While Grotius' reasons no longer fit the case of the seas, they do fit the case of intellectual property, as long as we can classify the objects of intellectual property as belonging to an Intellectual Common. What Grotius says about the sea helps make a case against private intellectual property rights beyond what we need to compensate inventors or perhaps set incentives for future inventions. Strikingly, a similar argument is available if there is no Intellectual Common. What emerges, and what this second step of my argument mainly provides, is a general case against the possibility of private intellectual property beyond compensation and incentive-setting wherever intellectual property is regulated – a case that does in no way depend on whether there in fact is an Intellectual Common.[5]

The third step (sections 9 and 10) connects the first two. In the first step we saw that collective ownership was one basis from which to derive human rights qua membership rights in the global order. But collective ownership is not the only basis from which we can derive global membership rights. Other such bases include global interconnectedness, enlightened self-interest, and independent moral reasons that must be acknowledged at the global level and that are tied to global obligations. Any argument seeking to show that X is a human right in this sense must show that the matter is indeed of genuinely *global* concern and is appropriately captured as a right.

[5] Reed (2006) applies Grotian ideas to the gene pool (using the analogy to the sea), but seems to believe these ideas are of use only to Christians. Much of the second part of this essay engages with Shiffrin (2001), who has explored related considerations within Locke's approach to property. For introductions to the philosophical concerns behind intellectual property law, see Shiffrin (2007). See also Kuflik (1989) and Fisher (2001). For a discussion of these issues specifically with regard to patents, see Sterckx (2005). Lessig (2004) argues for very limited copy-rights, which is kindred in spirit to the present argument. But as should become clear, my approach speaks more to patents than to copyrights.

The second step itself entails that wherever intellectual property is regulated, private intellectual property is acceptable only within the limits sketched. This result does not depend on my conception of human rights. Yet putting the first two steps together, we also find that there is a human right to vital pharmaceuticals, in the sense that such pharmaceuticals ought to be regulated at the global level and that private rights to them should be constrained as before. To make this point within the confines of my conception, we need to establish that the regulation of a sub-domain of intellectual property is of genuinely global concern, one that includes essential pharmaceuticals. To that end, I argue that the second step lets us conclude that the constraints on the regulation of that sub-domain offer the sort of independent moral reason that is of genuinely global concern. There indeed is a human right to essential pharmaceuticals.[6]

2. To introduce the standpoint of collective ownership, let me touch on a few themes from Grotius. Grotius offers this account of collective ownership of the earth:[7]

[6] Buckley and O Tuama (2005) and De George (2005) deal with pricing issues in the pharmaceutical industry. Questions there concern what profits would be justified given what risks and difficulties that industry faces, but also given how much they benefit from public subsidies. For a perspective on these matters skeptical of the pharmaceutical industry, see Angell (2004). See also Cohen et al. (2006). Other important issues in this literature include the question of what areas this industry should invest in, possibly at the exclusion of others; and how to market products. One important question is also to what extent regulation of intellectual property is causal to a lack of access to medication, and what remedies there might be. Kremer and Glennerster (2004) and Pogge (2008a) and (2008b) make proposals for how to change the incentives of the pharmaceutical industry to make medications available to the poor. Maskus and Reichman (2005b) argue that TRIPs has given rise to a transnational system of innovation that could produce powerful incentives to innovate for the benefit of mankind, if developed properly. A crucial question about TRIPs is whether there is any sense in which the regulation proposed by that agreement is in the "enlightened" self-interest of developing countries.

[7] I quote from DJB in the customary way, for instance " II.2.II.1." this means: Second volume; second book; second chapter; first section. The 2005 Liberty Fund edition is especially accessible. I also deal with Grotius' earlier work, *Mare Liberum*, *Free Sea*, which is part of a much larger work, *De Jure Praedae Commentarius*, *Commentary on the Law of Prize and Booty*, which, however, only became available in full in the 19th century. For *Mare Liberum*, I quote the pages from the 2004 Liberty Fund edition.

> Almighty God at the creation, and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World. All Things, as Justin has it, were at first common, and all the World had, as it were, but one Patrimony. From hence it was, that every Man converted what he would to his own Use, and consumed whatever was to be consumed; and such a Use of the Right common to all Men did at that time supply the Place of Property, for no Man could justly take from another, what he had thus first taken to himself; which is well illustrated by that Simile of Cicero, Tho' the Theatre is common for any Body that comes, yet the Place that every one sits in is properly his own. And this State of Things must have continued till now, had Men persisted in their primitive Simplicity, or lived together in perfect Friendship. (DJB, II.2.II.1)

God's gift can rightfully be put to use without any agreement. But this only works under primitive conditions, and does not even include a right to recover things left behind. Agreement is needed to create further-reaching rights, at least according to the account in *De Jure Belli ac Pacis*. Still, God's gift makes clear that the earth is *for* the use of human beings. As Buckle (1991) puts it, "in using the world for their own ends, human beings are not strangers (or trespassers) on a foreign soil. They are at home" (p 95).

Once primitive conditions have been left behind, property arrangements are conventional. To be adequate, these conventions must mind the fact that the earth was originally given to humankind collectively. One implication of this point is the postulation of a "right of necessity;" for

> in a case of Absolute Necessity, that antient Right of using Things, as if they still remained common, must revive, and be in full Force: For in all Laws of human Institution, and consequently, in that of Property too, such cases seem to be excepted. (DJB, II.2.VI.2)

This right does not derive from charity (II.2.VI.4). Instead, it restricts private property rights as they could have been intended, or at any rate, their legitimate scope. After all, in addition to his account of the divine gift, Grotius also offer an account of natural rights that include "the Abstaining from that which is another's, and the Restitution of what we

have of another's, or of the Profit we have made by it, the Obligation of fulfilling Promises, the Reparation of a Damage done through our own Default, and the Merit of Punishment among Men." Society was formed for the protection of what is one's own, the *suum* (DJB, I.2.I.5), and a sphere of what is ours exists prior to actual property arrangements. Whereas Hobbes thought the most basic insight one could make uncontroversial was that everybody had a right to self-preservation, Grotius started with a number of laws of nature in which what individuals have a right to is spelled out in ways meant *to be reasonable for everybody*. Grotius is guided by solidaristic assumptions, and an understanding of humanity as susceptible to moral motivation in principle.

Some limitations to property are not rights of necessity but general restrictions of what may be claimed under any conditions. Others may avail themselves of innocent profits (e.g., sail on our rivers), or demand free passage (even when trading with third parties, II.2.XI-XIII), rights that if denied can be claimed by force (II.2.XIII.3). People may rest ashore to recover from a journey, even build "a little Cottage" (II.2.XV.2), and seek "a fixed Abode" (II.2.XVI.2) if prosecuted at home, assuming they abide by local laws. Products must be sold at reasonable prices if they are not needed by the producers (II.2.XIX). Even the right to marriage ought not to be denied, women apparently being part of the common stock (II.2.XXI). All these rights are owed to all, not just a selected few (II.2.XXII). These strong constraints on ownership are much at odds with our current practices. As a striking illustration, consider cases of forced immigration:

> And if there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed Property, only so far as concerns Jurisdiction, which always continues the Right of the antient People. (II.2.XVII).

We will elaborate on this theme below, when discussing Grotius' account of the ownership of the seas, but what these cases make clear already is that the collective ownership status of earth, in conjunction with the additional natural rights Grotius postulates, puts considerable limitations on the possibility of privatization.

3. While Grotius took the biblical standpoint of the earth as a divine gift, like Locke he held that this view should be acceptable even if humankind had never received that revelation. Indeed, the view that the earth originally belongs to humankind collectively is plausible without religious input. Philosophically, we have much to gain by developing the idea that humanity collectively owns the earth, since this status affects what people can do with portions of the planet. Among other things, this standpoint generates constraints on what immigration policies to adopt (see Blake and Risse (2007), Blake and Risse (forthcoming)); it also leads to a conception of human rights. Two points are obvious enough: first, the resources of the earth are valuable and necessary for any human activities to unfold; and second, those resources have come into existence without human interference. These points must be considered when individual accomplishments are used to justify property rights strong enough to determine use across generations.[8]

Egalitarian Ownership is the view that the earth originally belongs to humankind collectively: all humans, no matter when and where they are born, must have *some* sort of symmetrical claim to it. ("Original" ownership does not connote with time but is a moral status.) This is the most plausible view of original ownership, because of the two points

[8] Much has been written on foundations of property; see Becker (1977), Reeve (1986), or Ryan (1987).

above: that the existence of resources is nobody's accomplishment, whereas they are needed for any human activities to unfold. Egalitarian Ownership is detached from the complex set of rights and duties civil law delineates under the heading of property law (Honore (1961)). At this level of abstraction from conventions and codes that themselves have to be assessed in relation to views on original ownership, all Egalitarian Ownership states is that all humans have a symmetrical claim to original resources.

One may say that the term "ownership" is misleading here, but I use it since there is this connection to the familiar, thicker notions of ownership in civil law; and we are, after all, concerned with what sorts of claims individuals have to resources. To be sure, the considerations motivating Egalitarian Ownership speak to raw materials only, not to what human beings have *made* of them. The distinction between what "is just there" and what has been shaped by humans is blurred, say, for land human beings have wrested from the sea, or for natural gas harnessed from garbage deposits. But by and large, we understand well enough the idea of what exists without human interference.[9]

We must now assess different *conceptions* of Egalitarian Ownership. Such conceptions differ in how they understand the symmetry of claims individuals have to original resources. There are, roughly, four types of ownership-status an entity may have: *no* ownership; *joint* ownership -- ownership directed by collective preferences; *common*

[9] A more difficult question is under what conditions man-made products, including improvements of original resources, should no longer be accompanied by special entitlements of those who made them or their offspring. See Blake and Risse (forthcoming) for discussion. Egalitarian Ownership formulates a standing demand on all groups that occupy parts of the earth to inhabit the earth in a manner that respects this symmetrical status of individuals with regard to resources. That Egalitarian Ownership operates in this way should be intelligible and acceptable even within cultures where individuals are not seen as property owners. Nothing about Egalitarian Ownership precludes such cultures from being acceptable to their members even if they do not treat individuals themselves as property holders. Yet even cultures that do not see individuals themselves as property holders must indeed be acceptable to those who live in them especially because all individuals have symmetrical claims to original resources.

ownership – in which the entity belongs to several individuals, each equally entitled to using it within constraints; and *private* ownership. Common ownership is a right to use something that does not exclude others from also using it. If the Boston Common were held as *common* ownership when it was used for cattle, a constraint on each person's use could be to bring no more than a certain number of cattle, a condition motivated by respect for co-owners and the concern to avoid the Tragedy of the Commons. Yet if they held the Common in *joint* ownership, each individual use would be subject to a decision process to be concluded to the satisfaction of each co-owner. Joint ownership ascribes to each co-owner property rights as extensive as rights of private ownership, except that others hold the same rights: each co-owner must be satisfied on each form of use.

So there are various interpretations of Egalitarian Ownership: resources could be jointly owned, commonly owned, or each person could have private ownership of an equal share of resources (or a value equivalent). These conceptions carve out a pre-institutional space of natural rights that constrain property conventions which in turn regulate what natural rights leave open. I submit that Common Ownership is the most plausible conception.[10] While I cannot offer a complete argument for this proposal here, I offer elaboration on what common ownership means, what it entails, and why it should be preferred to the other conceptions as an interpretation of Egalitarian Ownership.[11]

The core idea of common ownership is that all co-owners ought to have an equal opportunity to satisfy their needs to the extent that this turns on obtaining collectively

[10] In capital letters, "Joint Ownership" and "Common Ownership" are names of interpretations of Egalitarian Ownership and hence views about ownership of the earth, whereas in small letters "joint ownership" and "common ownership" are general forms of ownership of anything. I continue to say that humanity "collectively" owns the earth if the precise form of ownership does not matter.

[11] Risse (2005) offers supportive arguments, showing why other conceptions are problematic. I develop all of this at length in my forthcoming book on *The Grounds of Justice*. See also Risse (2009a)

owned resources. This formulation, first, emphasizes an equality of status; second, it points out that this equality of status concerns opportunities to satisfy needs (whereas there is no sense in which each co-owner would be entitled to an equal share of what is collectively owned, let alone to the support of others in getting such a share, any more than any co-owners of the Boston Common had a claim to such a share or to the support of others to obtain it); and third, it does so insofar as these needs can be satisfied with resources that are collectively owned (that is, nothing at all is said about anything to which the original intuitions motivating Egalitarian Ownership do not apply).

To put this in the Hohfeldian rights terminology, common ownership rights must minimally include liberty rights accompanied by what Hart (1982) calls a "protective perimeter" of claim rights (p 171).[12] To have a liberty right is to be free of any duty to the contrary. Common ownership rights must include at least rights of that sort; that is, co-owners are under no duty to refrain from using any resources. But the symmetry of claims postulated by Egalitarian Ownership demands more than liberty rights. In light of the intuitions supporting Egalitarian Ownership, to count as an interpretation of it, Common Ownership must guarantee minimal access to resources, that is, impose duties to refrain from interference with certain forms of use of resources. Therefore we must add that protective perimeter of claim rights to the liberty rights. We obtain enough mileage from the original intuitions to require that common ownership rights (for Common Ownership to serve as an interpretation of Egalitarian Ownership) be conceived of in sufficientarian terms, in the sense that no co-owner should interfere with actions of

[12] For the Hohfeld terminology, see Jones (1994), chapter 1; Edmundson (2004), chapter 5; Wenar (2005).

others if they serve to satisfy basic needs. These intuitions cannot be pressed beyond that. Equal Division and Joint Ownership both press them too far.

Yet we do have to add one more right. We must also make sure individuals can maintain their co-ownership status under more complex arrangements. A necessary condition for the acceptability of such arrangements is that the core purpose of the original rights can still be met. That core purpose is to make sure co-owners have the opportunity to meet their basic needs. In Hohfeldian terminology, co-owners have an *immunity* from living under political and economic arrangements that interfere with the ability of those subject to them having such opportunities.

4. Yet although humanity owns the earth collectively, and although the high seas and Antarctica are treated as a Global Common,[13] the remaining land is covered by states. The imposition of a system of states that divide up the world's resources needs to be reconciled with Common Ownership, on two grounds. First, each state imposes a complex system of political and economic relationships that determines which, if any, original resources individuals have access to. Second, a system of states imposes a system of ownership where groups claim (group-specific) collective ownership for certain regions. Co-owners are excluded from exercising rights with regard to much of what is collectively owned. So a state system (regardless of its moral virtues or prudential advantages) generates two problems for co-owners: it exposes them to the ex ante risks and ex post reality of finding themselves in conditions where their moral status as co-owners can be exercised at most in rudimentary ways if at all; and it allows them only

[13] See Malanczuk (1997), pp 149f and pp 184 ff. Outer space is also treated in this way.

limited exit options (if any) if they find themselves with an abusive government. In virtue of the concentrations of power that it includes, a state system has the power to violate the rights of co-owners, both by undermining their opportunities to satisfy their basic needs and by impeding their ability to relocate.

It is under these conditions that we must ask what to make of the immunity that individuals have from living under political and economic arrangements that interfere with *those subject to them* having opportunities to satisfy their basic needs. The relevant arrangement to which individuals are subject in this case is not merely the state in which they live, but the system of states per se. Each state, in virtue of its immediate access to individuals' body and assets, might deprive them of such opportunities, but so, crucially, might other states by refusing them entry if they cannot satisfy their basic needs where they live. At any rate, the claim just made is true of states that do have the ability the let people enter and allow them to satisfy their basic needs without making it impossible for some of their own citizens to do so. When individuals cannot satisfy their basic needs where they live, other states that have this ability but refuse entry would not merely fail to come to their aid; they would deny them the opportunity to satisfy these needs.[14]

[14] (1) One might say that generally individuals who are threatened where they live do not have the opportunity to travel to another state to ask for entry, and therefore such states would not contribute to their predicament but merely fail to come to their aid. At any rate, they would only contribute to the predicament of those who make it to their borders and are turned away. But this under-describes the extent to which a state system based on self-determination and inviolability of territory contributes to such predicaments. Were our world no longer committed to such principles and were rich states more inclined to admit people who arrive at their borders because, say, their ability to make a living is threatened in their country of origin, organizations would spring up that specialize in making sure such individuals get to wealthier destinations. Such individuals would pay for these services by pledging future income, or charitable organizations would do this job. (2) One might also object as follows: Suppose we own a boat together and somebody interferes with your use of it. This would not mean I have to stop that interference or else let you use the boat when I am entitled to using it. But this is a wrong comparison. If we own the boat in common and this situation arises, *and we are all in the boat,* then you would have to give me refuge on your side, at least as long as the boat does not thereby turn over.

Common ownership rights are natural and pre-institutional. Once institutions are founded, guarantees must be given to co-owners that institutional power will not be used to violate their status. Since such a violation is threatened by the system of states per se, such guarantees assume the form of moral demands against that system of states. Responsibilities that arise in this manner must be allocated at the level of the state system, as collective responsibilities, rather than resting exclusively with individual states and then only with regard to their members. I explain below why it makes sense to think of the rights thus derived – those rights that guarantee that individuals' status as equal co-owners be preserved, regardless of what particular property arrangements hold across the globe – as *membership rights in the global order* and why such membership rights in turn offer a plausible (alas non-standard) conception of *human rights*. But before doing so, let me return to Grotius and use his account to introduce the subject of intellectual property.[15]

5. One question that naturally arises on Grotius' account of collective ownership (mutatis mutandis for all such accounts) is whether *all* of the divine gift can be occupied at the exclusion of others. Grotius famously responded negatively, arguing that the *sea* could and should not be so occupied. His reasoning is of interest to us since it bears on questions about intellectual property. Grotius' work contains two accounts of private property, and so two ways of generating the question of whether *everything* can be

[15] My view does not presuppose that individuals "participate" in the global order. Even secluded tribes possess human rights. They are co-owners of the earth and are constrained by the imposition of the state system even if they do not actually feel the constraints. In the case of such tribes there presumably are unusually strong reasons to set aside enforcement of human rights. Yet if by any chance humans are discovered on the back side of the moon, the considerations explored in this study would not apply to them. That does not mean one can do with them as one pleases. But as they would not be members of the global order, these considerations would not bear on their moral status.

appropriated. According to *De Jure Belli,* the original common property is divided ever more, in response to changing socio-economic arrangements (II.2.II.5). People realize that adjustments are necessary, make agreements to that effect, or accept them tacitly. First occupancy decides who gets to privatize what.[16] At the beginning of DJB II.2.III, following his views about privatization, Grotius explains that the sea is excluded from privatization because it is big enough for everybody's use. This emphasis relates to his point in II.2.II, that the arrangement of common use served *the same purpose* as the subsequent introduction of private property. For the sea no new property regime was *needed* to ensure arrangements under different conditions serve the original purpose.

The earlier *Mare Liberum* (ML) also explains the process by which things became "proper." Again we read that at the earliest stage there merely exists a right to use. But *Mare Liberum* does not turn on agreements to explain what happens next. Grotius distinguishes between two stages of private acquisition (ML, pp 22f). First, acts of use create special relationships between things and certain individuals. Sometimes *use* amounts to consumption, thus to *abuse*: the apple I eat is no longer left for others to use similarly. Other things are made worse by being used. A form of private ownership is then inseparable from use. At the second stage, Grotius explains that something similar also occurs in other cases. The passage speaks of "a certain reason" (the Latin word being "ratio"). The value of assigning objects to specific people is realized: the "ratio" was that occupation often changes objects of use. Instead of compacts *modifying* common use, private ownership arises through *natural extensions* of use.

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[16] See DJB, II.2.II.5, but also II.3.1 and II.3.IV.1, and in II.8.VI.

Grotius next assesses the limitation of appropriation, especially regarding the seas (p 24). The centrality of occupation as basis for private ownership becomes clear again.[17] One reason why Grotius rejects the idea that some people can lay claims to the seas here is that the seas *cannot* be occupied. The mechanism that explains which individual would be the owner at the exclusion of others does not apply to the seas. Even if occupation were possible, it would be wickedness because the gains for occupiers would not depend on excluding others. There appears to be a tension between *De Jure Belli* and *Mare Liberum*, as one of them but not the other gives an important role to convention. Yet the point in both is that the earth belongs to everybody, but that it is left to the will of men to develop this gift. Precisely how particular arrangements come about is inessential, as long as the changes continue to make sense of the original situation of equity, and the changes are reasonable adjustments to new circumstances given Grotius' starting points.[18]

Behind Grotius' reasoning, we can reconstruct a conservative principle of occupation: unless there is a good reason to exclude people from parts of the earth, they should not be excluded. Although consistent with occupation at the exclusion of others under certain conditions, collective ownership also imposes obstacles to it. Collective ownership creates a reference point from which departures must be justified. (Recall the Grotian right of necessity and the inherent limitations to privatization.) The founding of political communities is a good reason for exclusion, and thus one way to meet that presumption against privatization: Grotius takes no issue especially with the existence of

[17] On the importance of occupation, see ML, p 24, p 34. On p 116 we read that, if things cannot remain common, they become the property of the first taker, both because the uncertainly of ownership could not otherwise be avoided, and also because it was equitable that a premium be put upon diligence.

[18] See also Buckle (1991), p 43.

states. Still, the burden of proof is on those who wish to legitimize occupation at the exclusion of others. As Grotius saw it, that burden could not be met for the sea.[19]

6. Nowadays the sea can be monitored by air and water, so differences between the ability to occupy land and water are a matter of degree. Nor does it still hold that use by one party leaves intact what others could do with the sea: that much is true for ships traveling through, but not for fishing and seabed exploitation. Writing in the late 19th century, Henry Sidgwick realized that Grotius' argument had expired with regard to fisheries (Sidgwick (2005), p 228), and worries about over-fishing have only increased since then. Complete freedom of the seas would no longer be called for on Grotius' terms. Yet Grotius' reasoning also bears on a different domain, the products of the mind, such as scientific, musical, literary, or other artistic works and inventions, but also images, names, symbols, or design patterns. These products are subject to intellectual property law, which, among other things, includes patents, copyrights, and trademarks. Transferring Grotius' reflections to intellectual property entails restrictions on private rights in that domain. Intellectual property law should compensate inventors and may set incentives, but acknowledge no further benefits for inventors. Although I continue to talk about *Grotius*, these arguments are also available in the secularization of his account.

Parallel to how Grotius points out that use of the sea is consistent with everybody else's use of it, Thomas Jefferson classically makes this point about intellectual property:

> If nature has made any one thing less susceptible than others of exclusive property, it is the action of the thinking power called an idea…. Its peculiar

[19] For the more recent development of the law of the seas, see Malanczuk (1997), chapter 12.

> character… is that no one possesses it the less, because every other possesses the whole of it. That ideas should be freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been…. designed by nature….. Society may give an exclusive right to the profits arising from them, as an encouragement…. to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaints by anybody.[20]

There is a point to having private property in things like apples since only one person can make certain kinds of use of them. There is no such point in having private property rights in either the sea or intellectual products. Gains for occupiers, certainly in the case of ideas, do not depend on excluding others, if we talk about actual use of ideas, rather than profits accrued from the exclusion.

Mare Liberum also argues for the freedom of the seas by appeal to its relevance for trade:

> For even that ocean wherewith God hath compassed the earth is navigable on every side round about, and the settled or extraordinary blasts of wind, not always blowing from the same quarter, and sometimes from every quarter, do they not sufficiently signify that nature hath granted a passage from all nations unto all? (ML, p 10; see also pp 49, 51)

Similarly, not only does use of ideas by others not subtract anything from their usefulness for others, it adds to it. *Everybody* benefits from a situation in which ideas are left unappropriated (given, in particular, that anybody's use of them does not interfere with everybody else's use), whereas only a few would benefit, respectively, if the appropriation of ideas were protected by social and legal norms. Of course, were we to change intellectual property arrangement now, some would be made worse off by such changes (so not everybody would benefit *from these changes*), namely, those who so far had been allowed to appropriate ideas, respectively. Yet what I have argued does hold

[20] Jefferson, "The Invention of Elevators" (Letter, 1813); quoted in Shriffin (2001), p 138).

from an ex-ante standpoint in which no intellectual property arrangements have been made yet and from which we must assess what sort of private rights to intellectual property (if any) there should be.

The seas cannot be occupied, says Grotius, and in certain, straightforward ways of understanding what it is to occupy something, that is certainly true of ideas. One can keep ideas secret, or distract people from them, but one cannot do anything to an idea that keeps it from being independently grasped by others. One cannot do anything to an idea parallel to how, in the case of land, "the beginning of Possession is joining Body to Body" (DJB, II.8.VI). A body A joined to another, B, takes up room that is thereby inaccessible for C to take up. A's being joined to B decreases the space for C to be joined to B. But a mind's grasping an idea decreases no other mind's capacity to do so. One might object that one can indeed "occupy" ideas in the sense that there could be (and in fact are) norms of intellectual property ownership, such as patent law and copyright law. But, crucially, "occupation" of ideas is possible *only* through the acceptance of such norms. One can occupy an apple by eating it and thus exclude others from doing the same; and one can (in a meaningful sense) occupy a physical location by standing there and doing something with it, and thus exclude others from doing the same simultaneously. These activities do not per se require social norms (though respect of others for what one has done with a physical location might). But since indeed one mind's grasping an idea decreases no other mind's capacity to do so, the occupation of ideas is *entirely* a matter of social norms. Such norms require a renunciation on the side of all others to do something with ideas that they can naturally do simultaneously with others. This observation then raises the question of why others ought to accept such

norms, a question that, in turn, takes us back to the other considerations against privatization that we discussed.

Yet these parallels do not constrain private intellectual property rights, at least not quite in the way in which Grotius' reflections restricted ownership of the seas. In that case, we first argued that the earth was collectively owned, which created a presumption against privatization that must be overcome. In a second step we argued that, for the seas, this presumption cannot be overcome: no new property arrangements were needed, were sensible, or otherwise acceptable for the seas. For intellectual property, certain considerations *would* support limitations on privatization *were* there a presumption against privatization. A ready way of arguing for such a presumption is to show that there is an Intellectual Common in the same way in which there is a Global Common. A straightforward way of arguing that, in turn, is to defend a kind of realism about intellectual products.

Such realism denies that scientific, musical, literary, or other artistic works are literally "products" of the mind. Instead, they exist outside the realm of either material or mental objects. They belong to a "third realm" of non-mental super-sensible entities, distinct from both the sensible external world and the internal world of consciousness. Alleged "products" of the mind would be such products only in the sense that a conscious mind can discover them. There would be no invention, refinement, or other *contribution* to these entities.[21] This view delivers a presumption against privatizing elements of this

[21] Gottlob Frege's 1918 essay "Der Gedanke: Eine Logische Untersuchung" ("The Thought: A Logical Investigation") is a locus classicus for this view, although I am, for the sake of the argument, offering an extreme version of it. See Gideon Rosen's entry on abstract objects at the online Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/abstract-objects/ For a general background discussion of abstract objects and questions of their existence, see Burgess and Rosen (1997).

third realm. For objects in that realm exist prior to any human activities. In a second step we could add the considerations against privatization we extracted from Grotius' discussion of the sea, to show that this presumption is hard to overcome.[22]

To be sure, this presumption *can* be overcome. First, individuals may fairly claim *compensation* for investments in making ideas accessible. Second, consistent with this argument for limitations on private intellectual property rights is for societies to *set incentives* to stimulate creativity. Yet in a next step I argue that this presumption excludes, or anyway offers heavy resistance to, considerations supportive of benefits or private intellectual property rights for inventors for reasons other than compensation and incentive-setting. This presumption has this effect regardless of which larger strategy of arguing for stronger private intellectual property one may choose, such as an approach in terms of natural law, in terms of a hypothetical contract between inventors and society, general considerations of distributive justice, or in terms of rewards for contributions made. I use a guarded formulation ("excludes, or anyway offers heavy resistance") partly because all these strategies have been explored extensively in the literature on the foundations of intellectual property and so it would be hard to do justice to them here; and partly because it is hard to establish this point conclusively. Perhaps there are considerations I am unaware of, and disagreement may remain with regard to the relative strength of different considerations, more than we can sort out now. Yet we can establish this conclusion with regard to considerations commonly entertained in the literature.

[22] For two of these considerations it should be clear how this works, that is, for the consideration that use of ideas by one person does not preclude others from using and benefiting from them, and that un-appropriated ideas benefit everybody but appropriated ideas only benefit a few. What about the point that ideas cannot be occupied in the sense in which, say, apples or land can be occupied? One might say ideas too can be occupied, namely through intellectual property protection. Yet such occupation can *only* be socially accomplished, if people generally abide by it. It is before the background of this move that the other considerations show why people could not reasonably be expected to abide by such protection.

Acknowledging compensation and incentive-setting as reasons for creating private intellectual property rights, we leave open much potential for disagreement about how far-reaching rights these considerations create. Notice the following articulation of this point by Judge Frank Easterbrock that we will revisit below:

> A patent gives the inventor the right to exclude competition for 20 years, and thus to collect an enhanced price for that period. Is 20 years too long, too short, or just right? No one knows. A copyright lasts the life of the author plus an additional period that Congress keeps increasing in response to producers' lobbying. What is the right length of a copyright? No one knows. A trademark lasts forever (or at least for as long as the product is made, and the name does not become generic in the public's mind). A trade secret (such as the formula for Coca-Cola, or the source code of a computer program) lasts as long as the developer can keep the secret. Are these durations optimal? No one knows. How much use, and by whom, should be permitted without compensation under the fair use doctrine? No one knows. (Easterbrock (2001), p 406)

7. Let us look at some arguments for more extensive rights to private property, assuming an Intellectual Common. To begin with, there is the argument that protecting inventions does not make anybody worse off. Those inventions would not exist without the inventor.[23] Waldron (1993b) replies that one may well be made worse off by inventions. Suppose I am dying of a disease for which there is no cure yet. Suppose somebody finds one, but that cure is inaccessible to me. Then I am not merely dying, but I am dying knowing I could be cured. Waldron quotes a 1907 textbook to illustrate Nozick's view, which captures the opposite attitude from Jefferson's:

> It is as though in some magical way he [a patent holder] had caused springs of water to flow in the desert or loam to cover barren mountains or fertile islands to rise from the bottom of the sea. His gains consist in something which no one loses, even while he enjoys them.[24]

[23] Nozick (1974), pp 178-182.

[24] John Bates Clark, *Essentials of Economic Theory* (1907), pp 360-361; in Waldron (1993b), p 866. A similar attitude is expressed in Bainbridge (1992): "The basic reason for intellectual property law is that a man should own what he produces, that is, what he brings into being. If what he produces can be taken

While Waldron's reply goes a long way towards answering Nozick, the issue is mute if there is an Intellectual Common. The person who made the water flow hit on something standing under a presumption against privatization. He should be compensated, but cannot demand rewards based on the (now *irrelevant*) fact that nobody is worse off.

This argument may seem implausible when creativity matters a lot. In many cases of scientific discovery, and perhaps in some cases of artistic innovation, different people work towards a breakthrough at the same time, in much the same way in which Robert Scott and Roald Amundsen were simultaneously racing towards the South Pole. Innovation draws on achievements of predecessors on which different people may build at the same time. But in some cases of scientific discovery and in many cases of artistic invention, it would be peculiar to say this. Becker (1993) refers to the Borges story "Pierre Menard, Author of the Quixote," a story about someone who devotes his life to re-writing (re-inventing) *Don Quixote* from scratch. Menard seeks to mimic Cervantes' mid-setting at the time of writing his master piece and to reproduce it, not from memory, but indeed *from scratch*. The reason why this is absurd – in ways in which it is not absurd that Scot and Amundsen simultaneously raced towards the pole, or that Newton and Leibniz invented the basic ideas of calculus at roughly the same time – is that Cervantes' artistic achievements seem so essentially tied to the functioning of *his* mind that even somebody who knows precisely what he knew would write a different novel.[25]

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from him, he is no better of than a slave. Intellectual property is, therefore, the most basic form of property because a man uses nothing to produce is other than his mind" (p 17).

[25] Becker (1993) also offers an illustration from a scientific context of the phenomenon that achievements are sometimes entirely disconnected from a societal state of knowledge and ability. He refers to the following statement of the mathematician Mark Kac: "'[T]here are two kinds of geniuses, the ordinary and the magicians. An ordinary genius is a fellow that you and I would be just as good as, if we were only

To defend the view that, still, there should be no private rights beyond compensation and incentive-setting, one may insist that *anybody* who makes a discovery benefits from the labors of predecessors, no matter how big a leap to the invention. One may also say the usefulness of, or appreciation for, the invention is determined by a social context.[26] But the main reply to the point raised by the Borges-story continues to be that if *indeed* there is an Intellectual Common, there will be more or less demanding discoveries, but no inventions. This point is not rebutted by the ludicrous nature of efforts to recreate the *Quixote*, any more than we could rebut the idea that the summit of Mount Everest has (presumably) been reached first and in that sense been *discovered* by Edmund Hillary and Tenzing Norgay by everybody else's inability ever to do so again. (Were this the case: suppose a disease permanently damaged the physical potential of human beings the day after their success.) If there is an Intellectual Common, some discoverers may be held in great awe, but they could make no inventors' claims.

Similar considerations apply to Child (1990)'s argument that there are infinitely many ideas: no inventor even makes the stock of ideas smaller. On that view, inventors should have rights beyond compensation and incentive-setting since they do no harm "removing" ideas from that pool. They bring something into our world in a way that makes nobody worse but some better off.[27] But again, these matters are mute if there is an Intellectual Common. To bestow additional plausibility on that move, recall Waldron (1993b), who thinks about property rights from the standpoint of those who are supposed

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many times better.' But for the second kind, 'even after we understand what they have done, the process by which they have done it is completely dark…'" (Becker (1993), p 617, note 22).

[26] See Hettinger (1989) on those two considerations.

[27] See also Moore (1997).

to comply with them. If there is an Intellectual Common, we need not appeal to social value to make it reasonable to resist compliance with demanding private rights. The metaphysical status of ideas renders such compliance unreasonable.

8. We needed strong assumptions to endorse the presumption against privatization that was central to these arguments. Realism about abstract objects, although controversial, is not outlandish. Yet we have not merely assumed that basic ideas, foundational themes, literary motives, or basic plots are elements of the realm of non-mental supersensory objects, but that the objects of patents and copyrights themselves are such elements, that is, finished scientific inventions, completed copyrighted poems, particular drawings, etc. We have made an assumption of realism about entities that bear a producer's distinct touch. Much patent law has been concerned "with the meaning and the characteristics of inventiveness and creativity, seeking to identify the locus of true innovation" (Lachlan (2005), p 107), and this strong realism makes these efforts look peculiar. A weaker form would place only basic components into the third realm, but this move would also weaken the presumption against privatization. To arrive at a plausible position, we must not base our argument on such strong realism about intellectual products. I will now show that we should restrict private intellectual property rights to compensation and incentive-setting *regardless* of whether we endorse such strong realism.

Consider a characterization of intellectual products that overemphasizes the subjective aspect mirroring how our earlier characterization overemphasized the objective aspect. According to this characterization, intellectual products are not discovered, but invented and created. There is no Fregian third realm, no Intellectual

Common, no presumption against privatization.[28] We cannot even state that we instead have a presumption in favor of *privatization* because there is no starting point with regard to which anything could be priva*tized*. But we now have a presumption in favor of private rights, potentially much beyond what compensation and incentive-setting license.

But crucially, what we above identified as considerations against privatization reenter. These considerations were: that ideas cannot actually be occupied in the same sense in which, say, land can be occupied; that the gains for users of ideas do not depend on excluding others; and that use of ideas by others often adds to their usefulness for any given user of these ideas. Above, these considerations ensured the presumption against privatization could generally not be overcome. (The exceptions were fairness-based compensation and consequentialist considerations in favor of incentives for invention.) Now the considerations against privatization limit the *extent* of rights for which in this case there is a presumption. These considerations again ensure we consider the standpoint of those expected to comply with intellectual property law. Both above and here these considerations entail that we should limit private property rights to what we can obtain via appeals to fairness and incentive-setting, although they enter in different ways.

[28] Paine (1991), which is a response to Hettinger (1989), captures the competing approaches to intellectual property very well: "We may begin thinking about information rights, as Hettinger does, by treating all ideas as part of a common pool and then deciding whether and how to allocate to individuals rights to items in the pool. Within this framework, ideas are conceived on the model of tangible property. Just as, in the absence of social institutions, we enter the world with no particular relationships to its tangible assets or natural resources, we have no particular claim on the world' ideas. In this scheme, as Hettinger asserts, the 'burden of justification is very much on those who would restrict the maximal use of intellectual objects.' (p 20) Alternatively, we may begin, as I do, by thinking of ideas in relation to their originators, who may or may not share their ideas with specific others or contribute them to the common pool. This approach treats ideas as central to personality, and the social world individuals construct of themselves. Ideas are not, in the first instance, freely available natural resources. They originate with people, and it is the connections among people, their ideas, and their relationships with others that provide a baseline for discussing rights in ideas. Within this conception, the burden of justification is on those who would argue for disclosure obligations and general access to ideas." (p 49)

But so far we have operated with caricature views on the ontology of the objects of intellectual property. The realist account unduly eliminates the contribution of human creativity, whereas the anti-realist account overstates the role of individual minds. This suggests an intermediate view, which according to Shiffrin (2001) would

> locate only the subject matter and materials of intellectual products in the commons, for example, facts, concepts, ideas, propositions, literary themes, musical themes, and values. Authors discover these things and their interconnections. They make them publicly accessible by expressing them, often, in unique ways. (p 159)[29]

As Shiffrin also remarks, the proper characterization of the metaphysical nature of the objects of intellectual property law may not be in terms of such a view "in between" the extreme views. Instead, the proper view might be a domain-specific hybrid that holds that the appropriate characterization depends on the sort of intellectual product we are talking about. In any case, the argument for limiting private rights to compensation and incentive-setting applies across the board. The same results follow for the regulation of intellectual property regardless of whether we have a third realm of ideas or whether ideas are human creations. The ontological status of particular intellectual products will have to be characterized *to some extent* in terms of components readily placed into a third realm, and *to some extent* by appeal to human creativity. (One of these extents may be vanishing.) So *to the extent* that we must appeal to something in that third realm, the considerations used for that case apply; *to the extent* that we are talking about products of

[29] I am indebted to Shiffrin's article for this part of my argument. Shiffrin's concern is with Lockean approaches to intellectual property. She argues that the presumption against privatization that comes from the idea of original collective ownership has often been underestimated in Lockean accounts of private intellectual property. In her view, Locke's "mixing" account of privatization does not provide a foundation for privatization per se, but creates a way of assessing which individuals would be allowed to occupy something. Given a presumption against privatization, Lockean accounts of property deliver considerable constraints on the possibility of private intellectual property. For opposing understandings on the Lockean approach to property, see Hughes (1988), Becker (1993), Child (1990) and Moore (1997).

the human mind, the considerations given in that case apply. Either way the respective argument generates the same constraints on private rights. Therefore, these constraints apply to the whole range of intellectual property.[30]

By way of comparison, consider Shiffrin (2001)'s strategy. Shiffrin argues that we can dispense with an appeal to a third realm of intellectual products (with regard to which all human beings would presumably be related symmetrically) to support the idea of an Intellectual Common. Instead, she postulates an Intellectual Common even on the very subjective view of the ontology of intellectual products: "Creations could become part of the common – available equally to all – when their nature did not require exclusive use, to symbolize the equal moral status of individuals" (p 164). Shiffrin uses what I call the considerations against privatization to postulate an Intellectual Common regardless of ontological facts about intellectual products. Drawing on Locke, she argues: (The "first" view mentioned is the one that stipulates an independent existence of intellectual products, the "second" is hers as just sketched)

> Locke's writings do not directly develop the foundations of the common property presumption. But there is reason to favor the second understanding. It, unlike the first, reflects the themes that initially animate Locke: the emphasis on equality, the connection between equality and common ownership, and reasoning about property in light of its nature – that is, in light of what is necessary to make full and robust use of it. The qualities of intellectual property strongly engage these Lockean themes – especially the facts that exclusive use if generally unnecessary for its proper use and that, to the contrary, its full exploitation commonly depends on nonexclusive use. These features generate moral reasons to regard intellectual products as part of the intellectual common, even if they are pure authorial creations. (p 164)

[30] To use a mathematical analogy: We have offered an argument for two extreme cases, and now have argued that the same argument also holds for the intermediate cases that can be understood as convex combinations of the extreme cases.

I have argued that the considerations against privatization play different roles depending on the metaphysical status of ideas, but that we arrive at the same constraints on the regulation of intellectual property regardless of whether there is an Intellectual Common. Shiffrin seeks to establish an Intellectual Common independently of metaphysical ideas about the objects of intellectual property. I think this slightly mischaracterizes the work done by the considerations against privatization. But that is a minor disagreement.

9. Let me summarize what we have argued so far. In a first step, I have explained how natural ownership rights give rise to associative rights at the level of the state system per se. Such rights guarantee that the imposition of the system of states is acceptable to co-owners. From Grotius we took the idea of the earth being collectively owned by humanity, and that collective ownership delivers a presumption against privatization. We returned to Grotius for the second step of our discussion. We looked at his exploration of the question of whether all collectively owned space was open to private appropriation. While we saw that Grotius' discussion of the seas is of dubious plausibility nowadays, it carries over to intellectual property. Our main result was that intellectual property should be regulated such that only limited rights to private intellectual property are acknowledged, determined by considerations of compensation and incentives only. We obtained that result independently of the ontological status of the objects of intellectual property rights, although that status mattered for the characterization of the precise reasoning behind the respective conclusions.

The third step is to bring these trains of thought together to show that there is a *human right* to vital pharmaceuticals, as follows: The argument in the first step does

some work towards the development of a particular conception of human rights; the argument in the second step helps us make sense of a human right to essential pharmaceuticals within that conception. Let me elaborate first, on the sense in which we have done work towards a conception of human rights. According to the conception in question, human rights are *membership rights in the global political and economic order.* The global order is the system of states that covers most of the land masses of the earth, as well as the network of organizations that, without constituting an actual government, provides for what has come to be called "global governance." These membership rights are partially derived from the standpoint of collective ownership as explained above. But as we will see, there are other bases too from which membership rights can be derived.

Being a member of that order means to live on the territory covered by it and to be subject to those bits of this interlocking system of jurisdictions that apply to one's situation. Nothing more is meant by "membership." By now all human beings are members in this sense. There being enough structure to the global order to render that very term applicable, as well as an accompanying capacity for coordinated action, is a condition for the existence of rights held within that order. And, indeed, there is enough structure because of the existence of organizations that are designed for, and in fact do concern themselves with, global problem-solving. Think of the population of the world as being contained in one large set, and of the global order as captured by relations among members of that set. All citizens of a given country stand in one such relation; all persons whose countries are in the WTO in another, etc. Membership rights in this order will be

rights individuals hold qua members of this set with those structures imposed on, where these internal differentiations matter when it comes to responsibilities.[31]

Such a conception of human rights, in virtue of resorting to features of an *empirically contingent* but *relatively abiding* world order, makes the applicability of human rights as understood on this account itself contingent. Individuals across history have not always held them, nor would those rights apply to a fictitious colony of humans on the back side of the moon should such a community be discovered. This does not mean one could do with such people as one pleases, but they would not be members of the global order. The main advantages of the present account – which I think are virtues considerable enough to compensate for counterintuitive nature and implications of the connections between human rights, membership in the global order, and collective ownership -- are that it readily makes clear why talk about "rights" is appropriate here (rather than talk about values or goals), and that it provides a non-parochial grounding of human rights in plausible starting points, which unlike, say, Griffin's (2008) view does not require inquiries into the nature of personhood, autonomy, or agency.

In light of the sheer relevance of the kind of thing whose ownership is at stake for all human purposes, one cannot simply reject this account as missing the point of "human" rights because it does not focus on providing content to the term "human." At any rate, ideas about universality that feed into our understanding of human rights are sufficiently complex to make it implausible that there will be a single philosophically

[31] One worry that may arise here is that such rights will not apply to everybody. (What of North Korea?) Note two things. First, membership, as explained above, does not depend on the participation of one's country in political and economic activities of the global order. The existence of organizations of global reach is important only to fend off the objection that there is not enough structure to render talk of membership rights meaningful. Second, more importantly, the task of establishing whether membership rights hold for everybody falls to the discussion of the different bases on which these rights can be held. Rights that can be derived from collective ownership do apply to everybody, but others indeed may not.

most successful conception of human rights. Different conceptions capture different aspects of our common ideas about human rights. The conception offered here cannot plausibly exhaust what we want to say about human rights.[32]

The defining feature of human rights in this view is that they are important moral demands against authority as it applies to individuals in their immediate environment and that are at the same time also *matters of urgent global concern*.[33] To argue that X is a human right, what is required in a first, preliminary step is that X be shown to be a matter of urgency in the affected agents' immediate environment, and then, second, that a genuinely global concern can be established. Again, there is no reason to think the only way in which something can become of global concern in a manner that renders the language of rights appropriate is that common ownership rights need to be protected. On

[32] (1) Cohen (2006) proposes that human rights have three features: they are universal and owed by every political society to everybody; they are requirements of political morality whose force does not depend on their expression in enforceable law; and they are especially urgent requirements. Any more particular account, says Cohen, has to meet these constraints, as well as two methodological assumptions: fidelity to the major human rights documents, so that a substantial range of these rights is accounted for; and open-endedness (we can argue in support of additional rights). These criteria do not entail commitments with regard to a range of questions about such rights. It is the function of a conception of human rights to provide a fuller set of answers to such questions. For instance, accepting these criteria does not imply that human rights must be understood as protecting essential features of personhood, though it is consistent with such an approach. A different way of adding detail to these criteria is to think of "human" rights as rights individuals hold qua members of the global and political order that ipso facto but contingently includes *everybody*. That is what the present conception does. (2) A conception that understands human rights as membership rights in the global order must be distinguished from Cohen's (2006) conception in terms of membership rights in political society. Cohen's notion of membership is that "a person's good is to be taken into account by the political society's basic institutions: to be treated as a member is to have one's good given due consideration, both in the processes of arriving at authoritative collective decisions and in the content of those decisions" (Cohen (2006), p 237 f).Human rights then are rights individuals hold in their respective communities to ensure inclusion. In the conception I defend rights that ensure inclusion in political communities will be among those that are the global order's responsibility, but this is so via an additional argument. For individuals everywhere to have a claim to something vis-à-vis their respective community does not suffice for this to be a claim of urgent global concern, in the sense that violations somewhere should be of serious concern to people everywhere or to global institutions. The difference between these two kinds of membership captures an ambiguity that permeates human rights talk, namely, whether such rights in the first instance apply to each individual, or else are of global relevance. If one endorses the first stance, the question becomes why others far away should care; if the second, the question becomes how much of what is of fundamental importance to individuals can be incorporated.

[33] I stated at the beginning that I took this reference to authority to be part of the concept of human rights.

the contrary, a strength of this conception is that it can accommodate a range of reasons why certain matters should concern the world as a whole.

Additional bases might be substantive or procedural. Since little of the details will matter later, I will be brief.[34] As far as substantive bases are concerned, one can argue in at least three ways that something should be of global concern. First, one might argue that this is so on the basis of *mutual enlightened self-interest*. For example, it may be necessary or conducive for the preservation of peace that authority is exercised in certain ways, based on the idea that unchecked governmental authority will also be abusive vis-à-vis others, or create negative externalities (refugees, etc). Second, one may argue that something is of global concern because there is a shared causal responsibility for the matter at hand that arises out of global interconnectedness.

A third substantive basis, a collective category, involves moral considerations that do not turn on interconnectedness. The ownership standpoint could be enlisted here too, but we have discussed it. Such considerations include appeals to a natural duty of aid (which would have to be acknowledged independently and does not turn on particular features of the global order), as well as possible duties of rectification (where it would have to be shown that the global order per se owes the rectification). In each case where such an appeal to a moral consideration is made, it will be crucial to offer an argument for why something is of urgent *global* concern – and this is precisely the argument we make below with regard to a right to vital pharmaceuticals. The second kind of basis is procedural. One way in which concerns can become common within a certain political structure, and one way in which they can become membership rights within that

[34] For more details, see Risse (2009) and Risse (forthcoming).

structure, is for them to come to be widely regarded as such, as a result of an authoritative process. Proposed "human rights" may receive support on any or all of these bases, and the strength of support arising from each basis may vary. Not all bases from which membership rights are derived apply equally to all individuals. A critical discourse can occur if a proposed right fails to receive support in all these ways.

10. So is there a human right to vital pharmaceuticals? To make that case, we need to show first that access to pharmaceuticals is a matter of urgency in the affected agents' immediate environment, and then, second, to establish an urgent global concern. I take it that the preliminary step is met for essential pharmaceuticals.[35] Possibly, my conception of human rights offers other resources to that end, but I seek to establish an urgent global concern through considerations of intellectual property.

At first sight, the second step of our argument seems to speak against there being such a concern. That second step provides us with a moral standpoint for assessing the regulation of intellectual property whenever such regulation takes place. What that standpoint does, however, is merely to clarify what *sort* of reasons bears on the determination of private intellectual property rights. This is compatible with much variation. (Recall the Easterbrock quote.) Compensation is compensation for materials used, but also for time invested. Then the question is how highly societies should value an inventor's time, compared to the time of others. Also, some societies may care more about fostering innovation than others. (Recall concluding part of the Jefferson quote.) One may say such regulation ought to be left to domestic law partly because no

[35] For the connection between health and social justice, see Hofrichter (2003) and Wilkinson (1996); see also chapter 6 in Barry (2005), Waldron (1993a), and Daniels (1985).

prescriptions other than constraints on the kinds of reasons that can be used follow from this standpoint, but also because such an assignment lets countries shape their comparative advantage. But if intellectual property explicitly ought *not* to be regulated globally, we find no human right to vital pharmaceuticals in this conception *if the goal is to establish one via considerations of intellectual property*.

Alas, nowadays, there *is* international regulation of intellectual property, notably through TRIPs. To that agreement the conclusions of the second step apply. We have shown that wherever intellectual property indeed is regulated, it has to abide by certain constraints. This conclusion leads to a critical assessment of TRIPs: As private rights ought to be limited to compensation and incentives, and as it is implausible that either of these would impose obligations on very poor countries, TRIPs should not impose burdens on them. The wealth differential between rich and poor is so large that compensation and incentives for the pharmaceutical industry do not depend on markets in these countries. Modulo adding an economic analysis, we obtain this result from reflections on intellectual property without saying anything about human rights.[36]

[36] (1) This argument does not engage with the moral acceptability of TRIPs in ways internal to considerations of compensation and incentive-setting. For instance, Maskus and Reichman (2005b) argue that TRIPs has given rise to a transnational system of innovation that could produce powerful incentives to innovate for the benefit of mankind, if developed properly. Usual arguments supportive of strengthening intellectual property protections even in developing countries include: the ability to build local research and development; to attract technology transfers; and to attract foreign direct investment. The economist Joan Robinson once spoke of the "paradox of patents:" "The justification of the patent system is that by slowing down the diffusion of technical progress it ensures that there will be more progress to diffuse" (Robinson (1958),p 87, quoted in Streckx (2005), p 197. As far as TRIPs is concerned, the question is whether the long term effects in terms of "more progress to diffuse" are sufficiently great to warrant the short-term costs not merely in terms of "slowing down the diffusion of technical progress," but also in terms of the more or less direct consequences of this slow-down (such as hampered access to medications). (2) One might say one concern behind TRIPs is to undermine certain possibilities of drug smuggling that benefits from the existence of countries without strong patent protection. However, I take it that the arguments in this study (in particular the argument for there being a human right to essential pharmaceuticals we are about to present) entail that different policies must be implemented to solve that problem, rather than the introduction of overly strong private intellectual property rights that – crucially -- require a plausibility independently of their effect on the smuggling of pharmaceuticals.

Can we also derive a *human right* to vital pharmaceuticals by enlisting considerations of intellectual property, despite the reasoning to the contrary presented earlier? We can if we can demonstrate an urgent concern at the global level with the regulation of a particular *sub-domain* of intellectual property that includes essential pharmaceuticals -- regardless of existing treaties, such as TRIPs, that may or may not have come about because of such a concern. Then the argument of the second step imposes constraints on the regulation of that sub-domain. To this end, we can offer two arguments. According to the first, the conclusion that the regulation of vital pharmaceuticals is a matter of urgent global concern emerges in the following three steps.

First, it follows from our reflections on intellectual property that for a certain domain of such property, there is a presumption that indeed it should be regulated globally. This domain includes those ideas tied to an underlying metaphysical picture in which it does make sense to speak of a discovery and an Intellectual Common. In that domain, any two human beings are symmetrically located with regard to ideas. There is then a prima facie case for global regulation parallel to the case for a global approach to the use of the three-dimensional space of the earth (with regard to which any two human beings are also located symmetrically), namely, to preserve this symmetry of all human beings with regard to the respective common. Second, pharmaceuticals are in this domain because they draw on physiochemical properties of molecules. Such properties are among the most plausible entities for which it makes sense to say they were discovered and exist in an Intellectual Common. These properties are what they are regardless of human activities, and regardless of whether it took ingenuity, effort, or serendipity to uncover them. And third, within the domain of those ideas with regard to which this prima facie

case for international regulation is plausible (i.e., those that are in an Intellectual Common), entities immediately connected to basic human needs make for an especially plausible and urgent case, and this includes vital pharmaceuticals. There is therefore an urgent global concern with the regulation of vital pharmaceuticals.[37]

This argument identifies what I have called an independent moral reason for there being an urgent global concern with the regulation of intellectual property in a certain domain. This argument also rebuts the objection that draws on the earlier considerations against global regulation of intellectual property, although that objection continues to apply to those *domains* of intellectual property not captured by the argument just offered. Alas, these gains come at a price: this first argument does make a rather serious ontological commitment to realism about the content of the driving ideas behind pharmaceutical patents, a commitment that is essential to the argument because the symmetry of any two individuals with regard to these ideas depends on it. It is welcome news, therefore, that there is a second way of identifying an independent moral reason for there being an urgent global concern with the regulation of vital pharmaceuticals.

This second argument does not turn on any ontological commitments about the subjects of intellectual property law. Recall that our conclusion in the second part of this paper was that wherever intellectual property law indeed is regulated, this regulation ought to abide by certain constraints, namely, acknowledge only compensation and incentive-setting as acceptable bases for private intellectual property rights. We saw above that this generates a critical assessment of TRIPs. More generally, then, we can

[37] One might think we could obtain this result by a plain appeal to needs. Perhaps so, but then the argument rests entirely on the notion of needs. My argument avoids this, and I think is the stronger for enlisting metaphysical considerations about the status of particular ideas (here: biochemical properties of molecules).

formulate an implication of the main result of the second part of our argument, as follows: There ought to be no regulation of intellectual property law *in particular* at the global level that grants private intellectual property rights that go beyond what we can obtain by way of compensation and incentive-setting.

This argument too identifies what I have called an independent moral reason for there being an urgent global concern with the regulation of intellectual property. Whereas the first argument we just presented identified the symmetry of any two individuals with regard to the underlying ideas of a certain domain of intellectual property as such a reason (and was based on particular, and controversial, ontological commitments), this second argument re-enlists the considerations against privatization that we extracted from Grotius to identify an independent moral reason against property regulations of a certain sort at the global level. (Recall that these considerations were: that ideas cannot actually be occupied in the same sense in which, say, land can be occupied; that the gains for users of ideas do not depend on excluding others; and that use of ideas by others often adds to their usefulness for any given user of these ideas.) So whereas the first argument identifies a reason *in favor of* regulation of a certain sort at the global level, the second argument identifies a reason *against* regulation of a certain sort. Put yet differently, the first argument formulates a positive case for regulation of vital pharmaceuticals at the global level and *then*, in a second stage, brings to bear the considerations we extracted from Grotius to formulate limitations on private property rights; as opposed to that, the second argument dispenses with that positive case, and this with the first stage of that first argument, altogether, and makes its case only in terms of the Grotian considerations against privatization.

But since there indeed is regulation at the global level now, and since global interconnectedness makes it inevitable that some property regime or other is in place at the global level regardless of whether there is one particular treaty (such as TRIPs) governing that regime,[38] both of these arguments have the same implications. That is, neither of these arguments generates a claim against anybody actually to invent vital medications that are not yet available. But both arguments entail that it is owed to people across the world that intellectual property generally and vital pharmaceuticals in particular not be regulated in a way that acknowledges far-reaching private intellectual property rights – *especially* (but not only) at the global level. In that sense, there indeed is a human right to pharmaceuticals: a right against constraints on access to pharmaceuticals on behalf of overblown private intellectual property rights.

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[38] This is also the response (on this second argument) to the objection articulated earlier that the second part of our argument actually entails that there ought to be no regulation of intellectual property at the global level. There is a sense in which this is a weaker argument than the first in support of a human right to pharmaceuticals in the manner to be identified at the end of this paragraph – that is, there is a philosophical gain from the ontological assumption that backs that first argument: The first argument generates a strong pro tanto reason in support of global regulation of intellectual property, one that has to be set aside in light of political, economic, or technological obstacles. As opposed to that, the second argument only generates a prohibition on particular forms of intellectual property regimes at the global level. This prohibition only applies once there de facto is some global intellectual property regime or other, in light of increasing global economic interconnectedness. So the strong premises of the first argument do make a difference in the strength of the conclusion that we can derive. But under those conditions just mentioned, then, which are the conditions under which we now live, these arguments do lead to the same conclusion.

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