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A critique of an argument against patent rights for essential medicines

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Abstract

Thomas Pogge has recently argued that the way in which research and development of essential medicines is incentivized, under existing World Trade Organization rules, should be supplemented with an additional incentivizing mechanism. One might hold a stronger view than the one that Pogge currently holds, namely that patent rights for essential medicines are morally unjustified per se. Throughout this paper, ‘the strong view’ refers to this view. The strong view is one that enjoys considerable support both within and outside the academic community. This paper critically discusses one specific argument in favor of the strong view. This argument is named the ‘Poggean argument’. This denominator is appropriate because a number of the essential premises of the argument are constituted by propositions that Pogge at some point has defended. The Poggean argument is valid, and defenders of the strong view also have some grounds for believing that the argument is sound. This belief comes, however, with what is arguably a too high cost, namely that the global institutional order becomes very demanding on taxpaying citizens of high-income countries if it is to be just. One may find acceptance of this cost relatively unproblematic, but this cost is, it is argued, unacceptable to anyone who has views on distributive justice that are sympathetic to the core tenets of libertarianism.

Keywords: political philosophy; global justice; essential medicines; patent rights; Thomas Pogge; libertarianism

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) negotiated in the 1986 Uruguay Round under the auspices of the General Agreement on Tariffs and Trade (GATT) incorporated considerable protection of Intellectual Property Rights (IPRs) into the international trade system. A very substantive body of contemporary interdisciplinary literature suggests that IPRs, as implemented in the TRIPS agreement, and various other trade agreements, give...
rise to a number of moral problems. The moral problems raised by IPRs are especially vivid when it is socially valuable goods such as essential medicines that are given intellectual property protection. From a distinctively philosophical perspective, there can be no doubt that Thomas Pogge is the most important contributor to the debate on the moral aspects of the TRIPS agreement. Pogge has, in a number of important writings, argued that the way in which research and development (R&D) of essential medicines is incentivized under the TRIPS agreement should be supplemented with an additional incentivizing mechanism. Together with Aidan Hollis, Pogge has suggested the Health Impact Fund (HIF).

At the heart of the HIF is the idea that a company that receives marketing approval for a new medicine will be offered a choice between exercising its usual patent rights through high prices or registering its product with the HIF. Registration with the HIF comes with a requirement that the company must sell its product worldwide at a price near the average cost of production and distribution. In return for selling its product at a low price, the company will receive, from the HIF, a stream of payments based on the assessed global health impact of its medicine. As a result, the HIF is an optional pay-for-performance scheme for new pharmaceutical products. The HIF is, moreover, a proposal that promises to reduce the scope of the availability problem in virtue of offering big monetary rewards to companies that develop medicines for diseases that primarily affect populations in low-income countries. The HIF is envisaged to be financed principally by contributions made by national governments.

A key feature of the HIF is that when a company registers its product with the HIF, the traditional link between a high selling price of a product and a substantive profit for the company producing the product is severed. This is so because profits from a product are no longer generated primarily through a high sales price for the product. A company that produces an effective medicine against, say, tuberculosis, registers the medicine with the HIF, and sells the medicine at a low price is likely to make a relatively huge profit on the medicine given that it will significantly reduce the global disease burden.

Through his involvement in the articulation and defense of the HIF idea, Pogge is not in recent writings, it is very important to note, opposed to patent rights for essential, or non-essential, medicines per se but only opposed to an unsupplemented patent right scheme for medicines.

One might hold a stronger view than the one that Pogge currently holds, namely that patent rights for essential medicines are morally unjustified per se. Throughout this paper, ‘the strong view’ refers to this view. It is important to be aware that the strong view is one that enjoys considerable support both within and outside the academic community. Consider, for example, the following five passages:

1. When a patent monopoly is against public interest—as is the case in many poor countries most affected by the HIV/AIDS pandemic—governments have the right and the obligation to free themselves from that monopoly.
2. If patents in poor countries do not serve valid public health purposes or contribute to pharmaceutical innovation, they cannot be seen as justifiable
limitations of core rights to life and medicines; and their adoption and imposition should in fact be seen as serious violations of human rights. The strong evidence and growing consensus that pharmaceutical patents in poor countries serve no public interest or innovative function suggest fundamental flaws in the justifications for the current global patent system, particularly considering the disproportionate regional loss of life that results from the stringent enforcement of patents for essential medicines.\(^9\)

3. Patents are by no means the only barrier to accessing lifesaving medicines, but they do play a significant role. Challenging invalid patents is therefore of crucial importance in order to prevent unwarranted patent monopolies and make treatment available to the people who need it.\(^10\)

4. We might think that if there is a moral right to access essential medicines, then the fact that someone would be no worse off than if the company had not invented the drug is not enough to show that he/she is not wronged. While it seems plausible to say that intellectual property restrictions can violate rights, it is much less plausible to think that any and every restriction will do so: if the good which is protected by IPRs does not serve a serious need (like a new type of coffee grinder), or if an existing item in the intellectual commons could perform substantially the same task, then the case for rights violation is weak. It is only where the good from which the person will be excluded is of substantial importance, and where the good cannot be substituted for one from the commons that it seems plausible to think that IP (Intellectual Property) regulation will violate rights.\(^11\)

5. Drug patents, particularly the strong kind of drug patents granted today, are hard to justify on natural rights, fairness, or utilitarian grounds. Many drugs are of vital importance for very large groups of people. This vital importance should be reflected in the debate about the justification of drug patents. The proposition that in the absence of strong patents no R&D of drugs can be expected is typically presented as universally valid—whereas it may well be that the advisable level of patent protection (or even the decision whether or not to grant protection) has to be determined in relation to the level of economic development of a country [...]. It seems that the reason why pharmaceutical lobbies are such zealous advocates of strong patents in developing countries is that it would allow them to hinder competition from local drug manufacturers. There is no credible evidence that the new global patent regime will promote the development of new medicines for diseases occurring primarily or exclusively in developing countries. Instead, this regime severely limits these countries’ possibilities to implement a public health policy that addresses the health crises they are confronted with, and it is one of the main factors that hinders access to existing (patented) drugs—access which the lives of millions of people depend on.\(^12\)

The overall topic of this paper is that of patent rights for essential medicines. In particular, the paper discusses one specific argument in favor of the strong view. I believe that the strong view is false, but in the next section, I do some work on
behalf of those who do not hold this belief. I construct, that is, an argument that can be used to underpin the strong view. I call this argument the ‘Poggean argument’. I use this denominator because a number of the essential premises of the argument are constituted by propositions that Pogge at some point has defended. I leave to one side the mainly exegetical issue of whether Pogge currently accepts the relevant premises.

The Poggean argument is valid, and I concede that defenders of the strong view also have some grounds for believing that the argument is sound. This belief comes, however, with what I take to be a too high cost, namely that the global institutional order becomes very demanding on taxpaying citizens of high-income countries if it is to be just. One may find acceptance of this cost relatively unproblematic, but this cost is, I argue, unacceptable to anyone who has views on distributive justice that are broadly sympathetic to core tenets of that libertarian position in political philosophy that has its modern genesis in Nozick. It is indeed one of the main conclusions of the paper that anyone who is of a broadly libertarian persuasion in political philosophy must be committed to the view that the Poggean argument is not sound.

The remainder of the paper is structured in the following way: in the next section, the Poggean argument is introduced. The section after that contains a critique of the Poggean argument. This critique centers on premise (1) of the argument. The main lesson to take away from this section is that if one accepts premise (1), then one is committed to a very demanding view of what a just national, as opposed to global, institutional order requires of taxpaying citizens in any high-income country. In the fourth section, I consider three replies that a defender of the Poggean argument can give in response to the offered critique of the Poggean argument.

The first reply is based on reference to a rather classical principle for how to set an upper limit for the duty to be beneficent. The principle in question is Liam Murphy’s ‘cooperative principle’. I argue that this first reply is unconvincing. The second reply trades on a detail in the wording of the passage from which (1) is derived. The exact wording of this passage may offer an escape route from the offered critique. It is argued that, in the end, this second reply is also unconvincing. The third reply is a suggestion to the effect that the critique of the Poggean argument rests on a misunderstanding of (1).

In the fifth section, I address this third reply in detail. I argue that the initial worry about premise (1) leading to an excessive demand in terms of how much money high-income countries should spend on Official Development Assistance (ODA) is just as relevant when the focus of the discussion is the social and economic rules imposed by the global institutional order as opposed to the social and economic rules that any individual high-income country imposes on its own citizens. Put very briefly, the central contention of this section is that if premise (1) is true, then a just global institutional order becomes very demanding on taxpaying citizens of high-income countries. I argue that one can bite the bullet and accept this implication of (1), but this is not an avenue that is open for travel for Pogge or anyone with libertarian leaning views. Furthermore, I offer some considerations as to why non-libertarians might want to be hesitant about believing that premise (1) is a principle that has
an important role to play when one is to formulate the necessary and sufficient conditions for a just global institutional order.

The concluding section of the paper is constituted by some final considerations. I make clear what can be reasonably concluded about the plausibility of the strong view if my critique of the Poggean argument is correct, and I present a dilemma that faces anyone who wishes to argue in favor of the strong view with the use of ideas expressed in the passages from which premises (1), (2), and (4) of the Poggean argument are derived. I suggest that on both horns of the dilemma, anyone who wishes to argue in this manner is likely to run into problems. Furthermore, I express skepticism about the plausibility of establishing a convincing argument in favor of the strong view from assumptions that a consequentialist in moral theory can accept.

THE POGGEAN ARGUMENT

With the domain of discourse being sets of social and economic rules, the Poggean argument can semiformally be presented like this:

1 (1) For every x, if x is avoidably depriving large numbers of persons of secure access to the objects of their human rights, then x is unjust.\(^\text{14}\) Assumption

2 (2) The set of social and economic rules that currently underwrite patent rights for essential medicines is depriving large number of victims of diseases that destroy a human life of secure access to relevant essential medicines.\(^\text{15}\) Assumption

1 (3) If the set of social and economic rules that currently underwrite patent rights for essential medicines is avoidably depriving large numbers of persons of secure access to the objects of their human rights, then this set of rules is unjust. 1, Universal quantifier elimination

4 (4) If the set of social and economic rules that currently underwrite patent rights for essential medicines is depriving large number of victims of diseases that destroy a human life of secure access to relevant essential medicines, then this set of rules is avoidably depriving large numbers of persons of secure access to the objects of their human rights.\(^\text{16}\) Assumption

2,4 (5) The set of social and economic rules that currently underwrite patent rights for essential medicines is avoidably depriving large numbers of persons of secure access to the objects of their human rights.\(^\text{17}\) 2,4 Conditional elimination

1,2,4 (6) The set of social and economic rules that currently underwrite patent rights for essential medicines is unjust. 3,5 Conditional elimination

7 (7) If the set of social and economic rules that currently underwrite patent rights for essential medicines is unjust, then this set of rules is morally unjustified. Assumption

1,2,4,7 (8) The set of social and economic rules that currently underwrite patent rights for essential medicines is morally unjustified. 6,7 Conditional elimination
A CRITIQUE OF THE POGGEAN ARGUMENT

Consider a country such as Sweden that in addition to providing free healthcare and education to any of its citizens also spends a relatively large part of its gross national income (GNI) on various uni- and bilateral ODA programs.\(^{18}\) This way of prioritizing the use of economic means is expressed through a number of economic/legal rules that are embedded in the various social institutions of Sweden. Premise (1) has the result that these economic/legal rules come out as being unjust. This is due to the fact that by modifying these rules, the deprivation of large numbers of persons’ secure access to the objects of their human rights can foreseeably be avoided. If Sweden, for example, doubled the amount of money it currently spends on ODA, then a significant amount of additional money would be available for projects that promote secure access to objects of human rights.

As soon as we raise the possibility of Sweden doubling the amount of money it currently spends on ODA, and come to realize that this will likely lead to an improvement in terms of secure access to objects of human rights, we might entertain the possibility of further increasing the amount of money to be spent on ODA. Perhaps Sweden should triple or quadruple the amount of money it spends on ODA. By making such a change, Sweden will, after all, make even more money available for ODA and improvements in terms of enabling secure access to objects of human rights. But, when we start entertaining these possibilities, we might come to think that there is an upper level with respect to the amount of economic resources that Sweden, and any other high-income country, can justifiably be asked to set aside for ODA and human rights improvements.

The worry one might have with premise (1) is that it sets this upper level too high. What premise (1) mandates is that Sweden (and a host of other high-income countries) keeps giving away to ODA and human rights improvements up until a level where the amount of money it can keep, after having provided secure access to all objects of human rights for all of its own citizens, is extremely small.

Consider the counterfactual situation in which Sweden has adopted an economic/legal system that stipulates that 20% of its GNI should be allocated to ODA. In order to achieve this goal, a massive restructuring of the taxation system and the distribution of wealth within Sweden has to be implemented. Assume that with these changes in place, there are still resources within the system to provide all Swedes with a secure access to all objects of human rights, and that there is a small surplus on the national budget. What should this small surplus be spent on? According to premise (1) of the Poggean argument, justice demands that the surplus should be spent on ODA provided that the surplus, at least partly, prevents the deprivation of secure access to objects of human rights for a large number of persons.

Now, given the assumption that even a very small amount of money spent on ODA cannot fail to prevent, in part, the deprivation of secure access to objects of human rights for a large number of persons, we arrive at the morally very demanding thesis that the economic/legal rules of Sweden, in this counterfactual scenario, are unjust unless the surplus is spent on ODA.\(^{19}\) Assume, for example, that the surplus in
question is US$ 6,000. This means that the surplus enables the buying of 400 full doses of tuberculosis medicine.\textsuperscript{20} Distributing one such treatment to each of the 400 patients in, say, Haiti is something that foreseeably and in part prevents the deprivation of these patients’ human right to medical care. Of course, for the deprivation of this human right to be wholly avoided for these patients, scores of other things have to change and scores of other resources have to be allocated to the goal.\textsuperscript{21} However, this does not change the very demanding conclusion that justice, as construed in premise (1) of the Poggean argument, prescribes that the surplus is spent on buying doses of tuberculosis treatment and cannot be spent on welfare improvements within Sweden such as, say, the upgrade of a public swimming pool or the acquisition of artworks for a public building.

THREE REPLIES TO THE CRITIQUE

A first reply that a proponent of the Poggean argument can make consists in saying that human rights might correspond to a division of moral responsibility for obligations to meet those rights. If all high-income countries have obligations to the members of poor countries, then no one high-income country has to cover the costs left unpaid by negligent countries. The upper limit of how much ODA a country such as Sweden is required by justice to provide might be determined by factoring in how much other high-income countries are required by justice to provide, so that no single country is left to pay the whole bill. An upper limit to what the Swedes are obligated to provide is consistent even with absolutist notions of human rights. This reply is undergirded by a line of thought famously introduced by Liam Murphy.\textsuperscript{22} Murphy addresses what might be labeled the ‘over-demandingness objection’, and he presents and defends a principle about what the legitimate limit is to the duty to be beneficent. Murphy calls this principle the ‘Cooperative Principle’. In its entirety, it goes like this:

\textit{Each agent is required to act optimally—to perform the action that makes the outcome best—except in situations of partial compliance with this principle. In situations of partial compliance it is permissible to act optimally, but the sacrifice each agent is required to make is limited to the level of sacrifice that would be optimal if the situation were one of full compliance; of the actions that require no more than this level of sacrifice, agents are required to perform the action that makes the outcome best.}\textsuperscript{23}

By invoking the Cooperative Principle, or some close version thereof, a defender of the Poggean argument can say that a commitment to premise (1) does not saddle individual countries with an overly extensive obligation to eradicate human rights deficits. The duty of individual countries is relatively limited because each country is only required to do what would be optimal in an ideal situation of full compliance in which all high-income countries did what was optimal to secure the eradication of human rights deficits.

The Cooperative Principle is, however, not plausible. Murphy himself explicitly acknowledges this by presenting a counterexample to it.\textsuperscript{24} Consider two adults walking
through a park on the way to the airport. They observe two children in danger of drowning in a lake, and the location of the children is such that if each of the two adults wades into the lake, they can both save one child and they can each catch their respective flight. If either of the adults saves both children, then that person will miss his/her flight. Murphy acknowledges that the best thing would be for each of the two adults to save one child. Suppose, however, that one of the adults refuses to sustain any loss to help a child. In this scenario, the whole burden of saving both children will fall on the other adult, and she has, as Murphy says, to put up with it and pick up the slack from the other person’s unwillingness to help out.

In the following text, I suggest a version of this example that involves individual countries and not distinct individuals. The lesson to learn from this example is, I hope to be able to show, that an individual country like, say, Sweden is morally unjustified in refusing to pick up the slack from other high-income countries’ unwillingness to help out with respect to the eradication of human rights deficits. If this example really is a counterexample to the plausibility of the Cooperative Principle as applied to the division of moral obligations among individual countries as opposed to distinct individuals, my contention is that enough has been done to establish a very significant weakness in the first reply to the critique of the Poggean argument.

Consider two national development agencies that each is running a tuberculosis clinic on, say, Haiti. Let us assume that the one clinic is run by the Swedish International Development Cooperation Agency (SIDA) and that the other one is run by The Korea International Cooperation Agency (KOICA). Both clinics are running close to capacity, both with respect to budget constraints and the rules that specify working hours and leave for the employees working at the respective clinics. Imagine now that there is a sudden and unexpected surge in the demand for treatment at anyone of the two clinics. We may assume that 400 additional tuberculosis patients are lining up for treatment at a central gathering place from where patients are normally distributed to one of the two clinics. We may assume that 400 additional tuberculosis patients are lining up for treatment at a central gathering place from where patients are normally distributed to one of the two clinics.

The situation is now as follows: if both clinics treat 200 patients each, each clinic (and by extension, each country) will bear only one cost, namely that of a budget transgression that stems from the cost of buying an additional 200 doses of tuberculosis medicine. If each clinic takes 200 patients each, each clinic will not be forced to make reductions in the amount of leave time that the health-care personnel, at the respective clinics, are entitled to according to their contracts with the respective governments. If one clinic will have to treat all 400 patients, then this clinic will bear two costs: a more severe budget transgression and a reduction in the amount of leave time that employees at the clinic are entitled to (such a reduction may cause frustration among the employees and may make it difficult for the government to recruit qualified personnel in the future for other relatively similar projects).

Under these circumstances, it would surely be optimal if each clinic took 200 patients each. Now, however, it turns out that KOICA refuses to take any additional patients. SIDA takes the first 200 patients from the line and then formulates a generic message directed to patient number 201 and all the rest of the patients in the line. The content of this message is that SIDA will not treat any remaining patients.
because the Swedish government is of the opinion that the Cooperative Principle is a good principle to apply when to determine who has obligations to do what to eradicate human rights deficits. According to this principle, Sweden (and any other country) is only under a moral obligation to do what would be optimal in an ideal situation of full compliance, and Sweden is therefore only under a moral obligation to treat 200 patients. Sweden is, the message emphasizes, not under any moral obligation to pick up the slack from other countries’ (in this case Korea’s) unwillingness to help out and do their fair share.

At this point, it is worthwhile to keep in mind that what the intuitive power of the original counterexample to the Cooperative Principle rests on is that the additional cost that the rescuer must incur when he/she picks up the slack from the uncooperative bystander, and saves the second child, is that he/she misses his/her flight. The example trades on the idea that this is a relatively small cost to pay to achieve the valuable end of saving a child’s life. The new example is relevantly similar. The only additional cost that the Swedish government incurs from picking up the slack from the Korean government’s unwillingness to help out is that it must impose a worsening of the working conditions of some of its employees at the clinic. The intuition upon which the new example rests is that this is a relatively small cost to pay for the valuable end of offering treatment to 200 tuberculosis patients many of whom will foreseeably die if they do not receive treatment. One can object to the suggestion that the above example shows what it is supposed to show either by arguing for the claim that the original counterexample is not convincing or by arguing that the new example is not relevantly similar to the original one. If one takes the former line, then one faces an uphill battle that consists in explaining away all the counterintuitive implications that the Cooperative Principle entails. I have no conclusive argument to block attempts to take the latter line. The burden of proof with respect to the plausibility of any such attempt must, however, lie with its advocates.

A second possible reply to the critique of the Poggean argument consists in making the suggestion that even though the deprivation of secure access to objects of human rights can in part be avoided by Sweden spending 20% of its GNI, and whatever budget surplus it may have after this, on ODA, Sweden should not modify its current social rules to fit such an economic scheme. The reason for this is that such modified rules are not ‘suitable’. By inserting in the passage from which premise (1) has derived the clause about ‘suitably modified rules’, a defender of the argument has certainly reserved himself/herself the right to give such an answer. However, in the absence of a clarification and defense of a suggestion with respect to what ‘suitable’ means and what general principle could be used to demarcate suitable modifications of the global institutional order from unsuitable ones, premise (1) has little, if any, theoretical significance or practical applicability.

It should here be observed that if it is suggested that the general principle in question is one that prescribes that providing secure access to all objects of human rights for all persons takes priority over alternative principles for institutional design (for example, one that says that the morally best course of action, policy or institution is the one that maximizes future human welfare), then one has done little to counter
the example given. When conjoined with premise (1), this principle does not block
the very demanding conclusion that Sweden should keep giving away to ODA up
until a level where the amount of money it can keep, after having provided secure
access to all objects of human rights to all Swedes, is extremely small.30

A third reply that a proponent of the Poggean argument can make consists in
suggesting that the critique rests on a misunderstanding of the issue of what features
of social and economic rules should be taken into account when we are to determine
whether or not these rules are just. What really underwrites premise (1) is the idea
that social and economic rules are unjust if they avoidably deprive large numbers of
persons on whom they are imposed of secure access to the objects of their human rights.

This interpretation of (1) squares well with a view that Pogge himself has
developed: namely that the global institutional order is unjust because it avoidably
deprives large number of persons of secure access to objects of their human rights.31
This deprivation is, for example, caused by the various kinds of trade barriers and
huge subsidies to domestic producers that are built into the global institutional order.
Insofar as Sweden has signed up to this global institutional order, Sweden’s social
rules are, on Pogge’s view, unjust.

If this is a correct interpretation of premise (1), then the offered critique of the
Poggean argument loses its potency. The subset of social rules of Sweden that
dictates how much of its GNI should be spent on bi- and unilateral ODA programs
cannot reasonably be said to be imposed on the citizens of Haiti. This subset of social
rules is only imposed on Swedish citizens, and in the above example, these rules do
not deprive a large number of Swedes of secure access to the objects of their human
rights. Therefore, this subset of rules does not satisfy the sufficient condition for
being unjust that is set forth in premise (1).

**MOVING TO THE INTERNATIONAL LEVEL**

One might think that this is the end of the dialectic, but it is not. The initial worry
about premise (1) leading to an excessive demand in terms of giving away to ODA
can now be raised with respect to the international level as opposed to a national one.
By definition, a global institutional order is imposed on everyone, and if premise (1)
yields the criterion that the rules that underlie the global institutional order must
meet in order to be just, then the bar for justice is set extremely high.

Consider the counterfactual scenario in which the global institutional order
stipulates that high-income countries must give away 10% of their GNI to projects in
low-income countries that aim at improving secure access to objects of human rights.
Assume also that this influx of new resources does not prevent that a large number of
persons in low-income countries do not have secure access to all objects of their human
rights.

In this scenario, premise (1) warrants the judgment that the global institutional
order is unjust. The injustice of the order stems from the fact that the order avoidably
deprives a large number of persons of secure access to objects of their human rights.
If the rules of this order were modified so as to demand that high-income countries
should spend 12% of their GNI on ODA, then large numbers of persons, who under
the old rules did not enjoy secure access to the objects of their human rights, would
start enjoying such access.\textsuperscript{32} Premise (1) also entails that a just global institutional
order must insist that high-income countries keep giving away to ODA up until a
point where either everybody enjoys secure access to all objects of their human rights
or the amount of money left for redistribution is so small that it cannot prevent,
in part, the deprivation of large numbers of persons’ secure access to objects of
their human rights. In combination, these things add up to a view about what a just
global institutional order looks like that is very demanding on the taxpaying citizens
of high-income countries.

One reply one can make to this critique consists in just rejecting the intuition upon
which the critique rests. One can, so to speak, bite the bullet and suggest that if the
demands of a just global institutional order are as high as described above, then we
just have to accept it. It is, one can continue, no argument to suggest that such a high
demand on taxpaying citizens of high-income countries is too demanding to be just.
To make such a suggestion is to do nothing more than express an intuition, and it is
of course open to other people to simply reject that intuition.

I accept that this is a logically acceptable reply to my objection. I say a little bit
more below about why the implications of this reply may make one hesitant to
embrace the reply. However, at this point, I want to suggest that the reply is one that
Pogge, or anyone with Pogge leaning views on global justice, cannot consistently
make. In many of his influential writings on global justice, Pogge has professed a
commitment to a broadly libertarian view to the effect that the world’s relatively
well-off primarily have negative duties toward the world’s poor.\textsuperscript{33} If Pogge wants to
stay true to this commitment, then it is hard to see how he can accept such high rates
of taxation, on affluent individuals in high-income countries, that are likely to be a
consequence of the Poggean argument. Of course, if such high rates of taxation are
necessary in order to compensate for a harm that the world’s relatively well-off have
inflicted upon the global poor, then Pogge is involved in no inconsistency if he
accepts the very demanding implication of the Poggean argument.

Premise (1) implies, however, that any human rights deficit that could partly be
eradicated through a modification of the rules that underwrite the global institutional
order is one that automatically yields a right to assistance. Such an implication is,
however, much stronger than what a Pogge qua libertarian can accept. A libertarian
figure within contemporary political philosophy can accept that human rights deficit
of x yields an automatic right to assistance from y if and only if human rights deficit
of x has come about through the harmful behavior of y. My master argument against
(1) of the Poggean argument trades on, and draws attention to, scenarios in which
some human rights deficits among the global poor have not wholly come about
through the harmful behavior of any of the world’s relatively well-off individuals.
Whether or not such scenarios exist is, of course, an empirical matter.\textsuperscript{34} Premise (1)
is, however, much too strong to be acceptable for anyone with libertarian leaning
views on distributive justice. This is so because the libertarian perspective implies
that a global institutional order can be perfectly just even in scenarios in which 1) a

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substantial number of the global poor do not have secure access to all objects of their human rights (say, they do not have access to minimal healthcare) and 2) a large number of the global poor could have, in part, their human rights deficits erased through a modification of the set of rules underlying the global institutional order (say, an increase in the mandatory taxation rate imposed on the relatively well-off citizens of high-income countries). Premise (1) automatically implies that any global institutional order that is in place in a scenario in which scenarios 1) and 2) are satisfied is unjust.

A second reply one can make to the offered critique of the Poggean argument consists in saying that though the deprivation of a large number of persons’ secure access to objects of their human rights can in part be avoided by modifying the global institutional order along the lines suggested above, no such modification should be implemented. The reason for this is that such a modification is not ‘suitable’. Again, by inserting in the passage from which premise (1) has derived the clause about ‘suitably modified rules’, a proponent of the Poggean argument has the right to give such an answer. However, in the absence of a clarification and defense of a suggestion with respect to what ‘suitable’ means and what general principle could be used to demarcate suitable modifications of the global institutional order from unsuitable ones, it comes across as ad hoc to reject the suggested modifications on the ground that they are not suitable.

**FINAL CONSIDERATIONS**

Assume that everything that has been argued in the previous sections is correct. Where does this leave us? There is certainly no justification for concluding that the strong view is false. From the fact that one argument in favor of conclusion x is not sound, it does not follow that all arguments in favor of x lack that property. So, even if the Poggean argument is not sound, there might be other arguments in favor of the strong view that are sound.

Defenders of the strong view may take solace from this. Such defenders may also be inclined to say that the discussion of the Poggean argument is of relatively little interest because it is so focused on fairly small details of just one argument in favor of the strong view. It would have been more interesting, the critique would continue, if the discussion in the previous sections had considered multiple arguments in favor of the strong view and tried to show that all these different arguments fail.

I think that this critique is largely unfounded. Let me end by offering some justification for this view by briefly mentioning a broad lesson that one can take away from the discussion in this paper. The lesson is that it is going to be easy to construct other valid arguments in favor of the strong view, if one helps oneself to the ideas expressed in the passages from which premises (1), (2), and (4) are derived. Premises (1), (2), and (4) are the essential premises of the Poggean argument and from them one can arrive at the strong view via a multitude of argumentative paths. However, something of a dilemma presents itself to anyone who goes down any of these paths. The first horn of the dilemma consists in the fact that the more one leans toward the
ideas underpinning premises (1), (2), and (4), the more likely it is that one’s argument is going to be vulnerable to the sorts of ‘demandingness’ objections presented in this paper. Consider, for example, the fact that both Forman and Wilson, in the respective passages cited in section one, are happy to accept that there is a right to essential medicines. In accepting this, they commit themselves to an idea that can also be found in the passage from which premise (4) is derived.

However, if patients have a right to essential medicines, then the gates are open for the making of a justified demand that other people must bear the cost of financing whatever products it is that these patients have a right to, if the patients themselves cannot shoulder this cost. This is bound to be very demanding on those taxpayers who will be forced to step in and pay the bill. If one goes as far as Forman and suggests that the right to essential medicines is a core right, then the bar for what must be the case for this right to be lost is set at a relatively high level, and the financing obligations of third parties are accordingly arduous.

The second horn of the dilemma is that the more one distances oneself from the ideas expressed in the passages from which premises (1), (2), and (4) are derived, the easier it is to stay clear of the criticism developed in this paper. It is then, however, going to be more difficult to construct a sound argument in favor of the strong view. Perhaps a sound, consequentialist argument can be assembled in favor of the strong view. I am skeptical about the feasibility of such an endeavor, but I cannot here undertake the task of demonstrating the plausibility of such skepticism. The only thing I can do is to draw attention to a recent argument developed by Rosenberg. This argument demonstrates convincingly, to my mind, that anyone who accepts fundamental consequentialist assumptions in moral theory must be in favor of patent rights for essential medicines. Anyone who accepts such assumptions must, that is, be opposed to the strong view.

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NOTES


3. Throughout this paper, ‘essential medicines’ is used to denote medicines for diseases that destroy human lives. This is a standard use of the term. T. Pogge, ‘Human Rights and Global Health: A Research Program’, *Metaphilosophy* 36, no. 1–2 (2005): 190. Paradigm examples of essential medicines include medicines for HIV/AIDS, malaria, and tuberculosis. Essential medicines are to be distinguished from medicines for, say, hair loss, acne, or impotence. The World Health Organization has a different, and slightly broader, definition of ‘essential medicines’. This definition stipulates that ‘Essential medicines are those that satisfy the priority health-care needs of the population. They are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness’. World Health Organization, *Essential Medicines* (World Health Organization), http://www.who.int/topics/essential_medicines/en/ (accessed May 13, 2014).


6. The ‘availability problem’ denotes the problem that there are a number of very serious diseases for which there are no, or very few, medicines available. This is especially so for diseases that mainly affect populations in low-income countries. R&D of medicines for diseases that mainly affect such populations is very limited. The primary reason for this is that many poor people simply do not have sufficient money to pay for medicines. Pharmaceutical companies therefore have little economic incentive for investing resources into the R&D of medicines for diseases that primarily affect the global poor. See Selgelid, *A Full-Pull Program for the Provision of Pharmaceuticals*.

7. It is worthwhile to give a brief overview of what it means to have a patent right for a specific pharmaceutical product. Within a specific judicial jurisdiction, a company can apply for a patent for one of its products. If this application is approved, then the company is granted a temporary monopoly on its pharmaceutical innovation (this monopoly is typically for a period of 20 years starting from the moment the application for the patent is submitted). During the monopoly period, competing firms are not allowed to copy or sell the pharmaceutical product in question. It is important to note that a patent right for a given product is tied to a specific judicial jurisdiction. Companies that are located outside the judicial jurisdiction in which the patent is granted are not bound by the legal requirements of this judicial jurisdiction. Another way of putting this is to say that patent rights are territorial. It is, however, an important feature of the TRIPS agreement that membership countries of the World Trade Organization (WTO) must offer patent protection, within their respective judicial jurisdiction, of products that are patent protected in the inventor-company’s homeland. A willingness to offer such protection is also a condition that must be met by countries that wish to join the WTO. It is therefore a consequence of the TRIPS agreement that patent rights extend into a multitude of national judicial jurisdictions World Trade Organization, *Frequently Asked Questions about TRIPS in the WTO* (World Trade Organization), http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm#Who’sSigned (accessed May 5, 2014).
With this brief overview in place, it is relatively simple to explicate what it means to be against patent rights for essential medicines. This simply means that one is of the opinion that it should not be possible to be granted a patent right for an essential medicine. For more details on the judicial aspects of the TRIPS agreement and patents for essential medicines, see S. Flynn, A. Hollis, and M. Palmedo, ‘An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries’, *The Journal of Law, Medicine & Ethics* 37, no. 2 (2009): 184–6.


14. I take this premise to follow from the following passage: ‘But human rights are the core values of our moral and political discourse, central to how justice is conceived in the modern world. Social rules that avoidably deprive large numbers of persons of secure access to the objects of their human rights are, for this reason alone, unjust (assuming again that these deprivations are avoidable, wholly or in part, through suitably modified rules)’ Pogge, *Human Rights and Global Health*, 195. This passage also offers an insight into the issue of what Pogge means by ‘avoidably’ in premise (1). I take it that what Pogge means by this is the following: x is avoidably depriving large number of persons’ access to the objects of their human rights if the deprivation caused by x can be nullified, wholly or in part, through a suitable modification of x. One last point of exegesis: according to Pogge, social rules encompass both legal and economic rules.

15. I take this premise to follow from this passage: ‘If these victims are so deprived, then who or what is depriving them, violating their human rights? Several factors, national and global, substantially contribute to the deprivations they suffer. As I have been arguing, one important such factor is the way pharmaceutical research into drugs and vaccines is incentivized under the current rules of the TRIPS agreement as supplemented by various bilateral agreements the United States has been pursuing’ Ibid., 197.

16. I take this premise to follow from the following passage: ‘In the world as it is, some 18 million human beings die each year from poverty-related causes, mostly from communicable diseases that could easily be averted or cured. In so far as these deaths and the immense suffering of those still surviving these diseases are avoidable, their victims are deprived of some of the objects of their human rights—for example, of their ‘right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services’ Ibid., 197.

17. The deprivation caused by this set of rules is, Pogge would say, avoidable in the relevant sense. By modifying these rules (either by abandoning them or supplementing them with an alternative set of rules), it will become possible to supply the relevant medicines at much lower prices than the ones that such medicines characteristically sell for in today’s world. Such lower prices for essential medicines will, in turn, lead to a greater accessibility to these medicines.

19. One might think that the mentioned assumption is false. The suggestion would here be that the assumption is falsified by the actual, or possible, existence of cases in which none of the resources allocated to ODA reach the supposed recipients. In such cases, ODA not only can, but also does, fail to prevent, even in part, deprivations of secure access to objects of human rights. There is, however, a straightforward rejoinder to this line of thought. If a donor gives money to an organization that promises to spend the money on ODA/foreign aid and the organization just pockets all the money, then the donor has spent no money on ODA/foreign aid. He/she/it has (unfortunately) spent all the money on a corrupt organization. Put differently, a donor spends money on ODA/foreign aid, as opposed to merely believing and/or hoping that it does, only if at least some of the donated money reaches the supposed recipients.


21. The important issue of how poverty and lack of infrastructure constitute a barrier to the delivery of essential medicines to patients in low-income countries is one that Pogge has emphasized in a number of his writings. It is common to think of this issue as the ‘last mile problem’. In order for essential medicines to be effective and have an effect on the global burden of disease, they must be delivered over the last mile, all the way to the patients who need them. Hollis and Pogge, *The Health Impact Fund*, chapter 7.


23. Ibid., 280.

24. Ibid., 291.

25. Of all the countries in The Organization for Economic Co-operation and Development (OECD), Sweden is the one that spends most on Official Development Assistance (ODA) when this is calculated in terms of percentage of Gross National Income (GNI). After Greece, Korea is the OECD country that spends less on ODA when spending is calculated in this manner. See The Organisation for Economic Co-operation and Development, *Net ODA* in 2011.

26. One might want to deny this. Providing medical treatment for 200 new patients brings with it a budget transgression of the magnitude x. Providing medical treatment for 400 new patients brings with it a budget transgression of the magnitude y (where y is twice the size of x). By providing treatment to the larger number of patients, SIDA therefore incurs an additional cost as compared to providing treatment to the smaller number of patients. This cost is the difference between x and y. This observation is correct, but it is not one that makes the new example relevantly different from the original example. The single rescuer in this scenario namely incurs an additional cost by saving two children as compared to the cost (ruining his/her clothes) he/she incurs by saving only one child. He/she needs to spend more time in the (unpleasant) water, and he/she needs to experience an extended period of time in those
(unpleasant) mental states that are likely to accompany frantic efforts to save a small child from drowning.

27. The scenario described in this example is one that plays itself out on the micro level. I do not, however, see any reasons as to why the general reasoning underlying the example cannot be extended to generate scenarios that play themselves out at the macro level.


30. How small? Assuming that at least US$ 6000 is needed in order to prevent, in part, the deprivation of secure access to objects of human rights for large numbers of persons, justice allows that Sweden can only keep up to US$ 5999 to spend on welfare improvements within Sweden.


32. Is this thought example unrealistic? One might think so based on the following considerations. It is a well-established principle in the aid literature that countries have a limited capacity to fruitfully absorb aid from United Nations Development Programme, *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty* (New York, NY: United Nations Development Programme, 2011), 172. Once levels of aid, as a percentage of GNI of a low-income country, go above a certain limit (around 10–15%), there is a high likelihood of both increased inflation and weakened local manufacturing (the problem is often known as the ‘Dutch Disease’) in that country. For empirical reasons, it is therefore unlikely that it would be beneficial to the population in low-income countries if high-income countries each gave 12% of their GNI to ODA. I owe a version of this objection to an anonymous referee from *Ethics and Global Politics*. This is a legitimate objection to the thought example, but there are a number of reasons as to why it can plausibly be fended off. First, one must keep in mind that not all instances of aid from high-income countries to low-income countries go through the government of low-income countries. There are numerous Non-Government Organizations (NGOs), funded at least partly by taxpayer contributions from citizens in high-income countries, that do aid work in low-income countries relatively independently of the respective governments in these low-income countries. The financing of such NGO work could therefore easily be scaled up without causing problems for the relatively limited operating capacity of the respective governments in low-income countries. State-funded aid agencies such as, for example, DFID, DANIDA, SIDA, and GIZ all offer financial support to NGOs working in low-income countries. Second, the problem of Dutch Disease is unlikely to occur on the assumption that the increased aid contributions primarily go to improvements in the health and education sectors of low-income countries. It is hugely expensive to establish and cover the day-to-day running costs of competent and professional healthcare clinics, hospitals, and schools for very close to all of the global poor. The cost of providing such services, with such an extensive range of coverage, is likely to increase given the population growth in low-income countries that is expected to take place in the coming decades. For an appreciation of the projected global population growth, consider this estimate from the United Nations: ‘Almost all of the additional 3.7 billion people from now to 2100 will enlarge the population of developing countries, which is projected to rise from 5.9 billion in 2013 to 8.2 billion in 2050 and to 9.6 billion in 2100’ [..]. Growth is expected to be particularly dramatic in the least developed countries of the world, which are


34. There is some empirical evidence for the view that some human rights deficits among the global poor have not come about through the harmful behavior of any of the world’s relatively well-off countries. See S. H. Hounton, H. Carabin, and N. J. Henderson, ‘Towards an Understanding of Barriers to Condom use in Rural Benin using the Health Belief Model: A Cross Sectional Survey’, *BMC Public Health* 5, no. 1 (2005): 8. For a discussion of cultural/religious barriers to condom use in Benin. See L. Al-Mugahed, ‘Khat Chewing in Yemen: Turning Over a New Leaf’, *Bulletin of the World Health Organization* 86, no. 10 (2008): 741–2. For a discussion of the extensive use of khat in Yemen and a number of countries in East Africa. According to WHO, the biggest health risk to male adults (15+) in Afghanistan is tobacco use. See World Health Organization, *Afghanistan Health Profile* (World Health Organization), http://www.who.int/gho/countries/afg.pdf (accessed May 14, 2014). Individuals who find it unproblematic to accept the very demanding implications of premise (1) should realize that the view that premise (1) is true saddles them with a commitment to the idea that a global institutional order cannot be just if there is money available, and it does not finance health interventions that can partly eradicate lack of access to minimal healthcare that is effective in ameliorating health problems which are a consequence of tobacco use, khat use, or a religiously/culturally motivated refusal to conform to well-known safe-sex practices.

35. It is important to note that this justified demand remains in place even in scenarios in which it is the patients themselves that are responsible for the fact that they are in need of essential medicines.