

Medicine or Money?

A Normative Analysis of What Matters Most

Linn Hege Lauvset



Master Thesis

Department of Political Science

UNIVERSITY OF OSLO

23 May 2014

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Medicine or Money? A Normative Analysis of What Matters Most.
Linn Hege Lauvset
<http://www.duo.uio.no/>
Print: ARENA Centre for European Studies, University of Oslo.

Abstract

In this master thesis I investigate a question that is and always will be of importance: *What is it that matters most?* On this occasion, the way in which the question is presented is: Which of the two rights – to health and intellectual property – should be prioritized in situations where the two come into conflict with each other? I seek to make clear which interest or right should be considered most important. The question is answered by performing a normative analysis of contributions in political philosophy by John Rawls, Robert Nozick and Henry Shue. These three thinkers represent different theories on how a just society should be governed, which principles peoples should live by, and which rights are the most fundamental. The conflict of interest that is analyzed is one that arises between human beings in need of medical care, and those who invent and manufacture medications, and such hold patents on medical developments. In my thesis, I uncover what the three theories prescribe with regards to solving this conflict of interest, as well as confront the arguments with each other.

Whilst the theories of Rawls and Shue push towards a prioritization of a right to health, the strong regard for property rights in Nozick leads to a different conclusion on his end. When the arguments are confronted, all three potentially lead to priority being given to promoting a human right to health. However, as can be seen in the analysis – this is a truth with certain limitations. A right to intellectual property may have further implications for a right to health than that of serving as a hinder.

Word count: 21,136

Acknowledgments

My grandmother held me a few hours after I was born and with great seriousness said: ‘Promise me just these things – you will learn how to swim, and you will learn to how to speak English’. Her first and greatest wish for me was to master what she had not been able to, and also to enrich my life through education. To her and all others who encourage the pursuit of knowledge: I owe you everything.

Writing this master thesis has been a highly enlightening endeavor. Throughout the process I have not only been made keenly aware of my own strengths and limitations, but also been able to truly comprehend the importance of support and advice from fellow students, supervisors, family and friends. My supervisors, Raino Malnes and Kjersti Skarstad, have proved invaluable as mentors over this last year. They have provided me with feedback, encouraged my work and at times calmed my nerves. Without their guidance, as well as the pointed advice from Anne Julie Semb, regarding the path of my research project, this thesis would not have become a reality. I thank you all sincerely.

To all my friends: I thank you for endless hours of discussions and student years filled with both hard work and a lot of joy. To my family; Mamma, Pappa, Marlen and Willy André – I hope I have made you proud.

And lastly, to the Wolf: You have my eternal gratitude for all that you have taught me, for your patience and for your commitment to never letting me win an argument. As it turns out, it wasn’t too far to swim.

Although I have had help and guidance along the way, all mistakes and inaccuracies are mine and mine alone.

— Linn Hege Lauvset

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List of abbreviations

AIDS – Acquired Immunodeficiency Syndrome

ASEAN - Association of Southeast Asian Nations

ARV – Antiretroviral (treatment)

HIF – Health Impact Fund

HIV - Human Immunodeficiency Virus

P6W – Paragraph 6 Waiver

PhRMA – Pharmaceutical Research and Manufacturers of America

R&D – Research and Development

SAMA – South African Medicines Act

TRIPS – (The Agreement on) Trade Related Aspects of Intellectual
Property Rights

UN – The United Nations

UDHR – Universal Declaration of Human Rights

US – Unites States (of America)

WTO – World Trade Organization

WHO – World Health Organization

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1 Introduction

In the study of political science, scholarly contributions may take on one out of two archetypes of style. They can seek to explain what something is and why; or they can investigate how something *ought* to be. This second approach is referred to as *normative analysis*, and has strong ties to both philosophy and ethics as fields of study.

Within political science we also differentiate between *politics* and *policy*. Politics, generally speaking, is the construction of an institutional framework suitable to shape society and human interaction on different levels given certain interests and goals, whilst policy lays out how to go about this in practical terms. The intermediary step between these two is the normative evaluation of which interests *should* be translated into action. Rather than explain how something came to be and why, the normative researcher bases his or her writing on the well-founded argument and on a moral evaluation of the virtue and merit of diverse actions. This approach can be recognized by the application of a set of norms to a problem, in order to discover which solution to the problem is the *right* one.

This thesis will make use of the longstanding normative tradition within political science and *weigh the right to health against the right to intellectual property*.

Because out of these two, which right matters most? Are these rights a pair that could or should be enforced at the same time? And, in situations where the rights come into conflict with each other, which right should be given priority? I set out to answer questions such as these in this thesis.

It is my goal to be able to make some assertions as to what some of our times most read and well-known political philosophers would answer, presented with these questions. It is also my goal to make an assessment as to which of them we should lend our ear to, when seeking to go about the practicalities of prioritizing between different rights.

1.1 Research question

Considering how – or even whether – to prioritize one right over another means getting involved in an argument of *what matters most*. In order to make clear why the allocation of relative importance to different rights is interesting, as well as a moral question deserving of normative analysis, I will in the following present some figures that point towards an intrinsic conflict between the two rights.

According to the World Health Organization (WHO) thirty-four million people are infected with the *human immunodeficiency virus* (HIV) or have *acquired immune-deficiency syndrome* (AIDS) (WHO 2013a). Inhabitants of Sub-Saharan Africa accounts for less than ten per cent of the world's total population, yet 66 per cent of all AIDS cases worldwide are found in this region (Saslow 1999: 577). 80 per cent of those in clinical need of antiretroviral medicines throughout the world cannot gain access to life-saving or life-extending medication (Greenbaum 2008: 142). An argument can be made that this is due to the extravagant cost of such medications.¹

On the word of James Crook (2005: 528), it is the rampant poverty in many of the world's regions that is the foundation for the discussions on which of the two rights to give preference to when they come into conflict. With barely \$8 a person to spend on health care and medical treatment per year in most sub-Saharan countries, the price tag of \$10.000 for name-brand antiretroviral treatments against HIV/AIDS becomes insurmountable (Crook 2005: 528; Lauvset 2013). Patent control thus becomes a major obstacle to providing citizens with the medical treatments and the drug regimens they require in order to stay alive. The World Trade Organization's (WTO) agreement on Trade Related Aspects of Intellectual Property (TRIPS) has been heavily criticized for ensuring patent protection, whilst not doing anything, or at least not enough, to prevent life-saving drug treatments from becoming unattainable

¹ This argument has been made by several researchers; see for example Crook 2005; Greenbaum 2008, Joseph 2003, and Saslow 1999.

for the poor. Developing countries have long sought for development-oriented provisions in the WTO, and the TRIPS agreement in particular, but the organization and the agreement still leave much to be desired (Sell 2006: 147). The World Health Organization (WHO) is one of the platforms where these concerns are being voiced. The WHO was heavily involved in the Doha Development agenda in 2001, in working for amending the TRIPS agreement to incorporate measures that would protect and promote access to medical care (Greenbaum 2008: 148–150).

The cost of medicines, and through it the right to health, is strongly linked to the right to intellectual property, through national- and international patent law ensuring and protecting ownership over intellectual property. What the figures of the last paragraph serve to illustrate, is the fact that the cost of medicine can, and often do, negatively influence the possibility for those of limited means to acquire medicines, and as such create problems with enforcing the human right to health. Patents create a drug market characterized by monopoly behavior; in that patent holders have the right to limit the production of similar products, and to some extent also decide the cost of the products their patents grant ownership over (Pogge 2011: 2). The right to intellectual property is due to this in direct conflict of interest with the right to health, with regards to the possibility of enforcement.

This conflict of interest, between those in need of medicines and those who hold patents, is a source of great controversy. Not only in the case of access to HIV and AIDS medication on the African continent is this a vital, heavily debated issue. In most of the world's nations – taking on different forms given the particular conditions of each instance – the access to medical care and medicine has been and is being deliberated.

Entries into this debate can (1) follow the lines of arguing for or against the rights themselves; (2) be regarding the merits of a universal health care plan²; (3) take on the form of an evaluation of international agreements' effect on the supply of rights; or (4) constitute scientific case studies of particular instances of conflict.³

There is thus a great deal of research to be found on the topic of health care – or lack thereof – in the developing-, as well as the developed world. This thesis will constitute a supplement to a widespread, important debate. Through looking at normative theories within political philosophy, in order to illuminate the issue further, this thesis sets out to make some claims as to *what matters most*. The research question of this thesis therefore becomes:

Which of the two rights – to health and intellectual property – should be prioritized in situations where the two come into conflict with each other?

In order to be able to make these assertions, the conflict between the right to health and intellectual property will be viewed through the normative theories of John Rawls, Robert Nozick and Henry Shue.⁴ It is these three contributions in political philosophy that will make up the theoretical framework and outset for my discussion.

² One example here is the on-going debate in the United States of America, regarding The Affordable Care Act, or 'ObamaCare'. For more information, see Yost 2014.

³ Examples of this last point are studies of the pharmaceutical industry and/or legal framework studies of intellectual property. See for example Bollyky 2013; Bombach 2001; Crook 2005; Greenbaum 2008; Risse 2008 and Saslow 1999.

⁴ For a further clarification and an overview of these theories, see chapter 4.

The research question can then be divided further into two specified enquiries:

a) According to John Rawls, Robert Nozick and Henry Shue – which right should be given priority in instances of conflict?

–and–

b) Given the three theorists' arguments for priority of one right over the other – which approach holds up best in a confrontation of arguments?

It is necessary to emphasize here that even though focus in this thesis is put on the evaluation of theories and a confrontation of normative arguments, it is the implications and more general interest for society as a whole this discussion will lead to, that serves as motivation for the inquiry.

1.2 Structure of the thesis

In my thesis I will build towards an analysis of how to weigh the two rights against each other, and which to prioritize in a case of conflict, based on the normative prescriptions generated through the theories analyzed.

Firstly, I will in chapter 2 present some reasons as to why this debate deserves attention. This chapter is necessary not only to place my thesis in a greater context within the field of political science, and specifically of political philosophy, but to show why the question is of further interest to society and to rights enforcement. Secondly, chapter 3 will briefly explain and define the rights to health and to intellectual property, so as to better be able to understand what specifically is being discussed within the confines of these pages. Chapter 3 will also further elaborate on the problems with regards to enforcing the two rights simultaneously. Continuing, chapter 4 will present the three separate theories that permeate throughout my analysis, so that I in chapter 5 am able to point back to topics and arguments discussed within the theories.

Chapter 5 constitutes the analysis portion of this thesis, divided into chapter 5.1 and 5.2, to answer sub-points (a) and (b) of the research question respectively. The analysis will firstly shed light on the three theories and what they prescribe separately, as well as put the arguments up against each other. Finally, I will in chapter 6 present a summation of my findings, and draw my final conclusions.

2 Motivation for research

This chapter presents the motivations for inquiring into the issue of which right to grant priority to in instances of conflict. The chapter is deemed necessary in order to explain why it the question is of interest, and explain importance of this issue being understood as one of moral concern and normative significance.

2.1 Conflict of interest

First and foremost, the motivation for the research question of this thesis is the apparent conflict of interest between rights to intellectual property (or patent rights) and the right to health (or health care and medical treatment).

Today, the tool used to protect and ensure rights to intellectual property on an international level is the World Trade Organization's agreement on Trade Related Aspects of Intellectual Property. The WTO is an organization whose responsibility it is to facilitate and regulate international trade, and membership in the WTO prescribes amendments and alterations in national legislation, in order to comply with the regulations set forth in the TRIPS agreement. Part of the WTO's work is related to protecting intellectual property rights. As worded by the World Trade Organization:

The social purpose [of protecting intellectual property rights] is to provide protection for the results of investment in the development of new technology, thus giving the incentive and means to finance research and development activities.

(WTO 2013a)

In addition to protecting intellectual property rights, and thereby serving the (business) interests of medical technology developers and pharmaceutical companies, amendment measures have been taken to change the TRIPS agreement in order to ensure that public health in developing and least-developed nations does not suffer

unduly. This shows that there is an understanding of a duality to the question of supplying the right to intellectual property, based in the concern for what it entails for global public health. The makers and signatories of the TRIPS agreement so realized a need to protect intellectual property rights⁵, yet are also aware of the possible implications of this on the human right to health. This realization, of the possible complications arising from patent rights, in my opinion highlights the need for a discussion on which right to give priority to in situations of conflict. This discussion will be relevant for as long as the current treaty and agreement design is still being criticized for impeding work done in accordance with promoting global public health.

2.2 Fundamental rights and global poverty

Many human right scholars have argued that a human right to health should be understood as among the most basic of human rights and that it is worthy of going to great lengths to protect and ensure.⁶ If we accept this, as well as the premise that the supply of a right to intellectual property is negatively influencing the access to medical care, this will have grave consequences, and is worthy of scientific as well as societal debate.

Another argument I believe underscore the need for research on the topic of how to prioritize rights, also drawn from the world of human right scholars, is relating to global poverty. Most can agree to the proposition that extreme poverty should be eradicated – as it produces great human suffering and every human being should be able to attain a minimum standard of well-being. Some will agree to this perhaps due to the effects of poverty on the global economy and others perhaps rather due to more humanitarian concerns.

⁵ This need to protect patent rights is most often characterized by a reference to the necessity of securing profit from investment in research and development.

⁶ See for example Crook 2007: 534; Pogge 2007a and 2011; Shue 1996 and Toebes 1999.

Regardless of why one accepts the premise, low or no access to medical treatment is inseparably linked to poverty, on the individual level as well as on a societal level. An individual with a very low income would be incapable of spending large amounts of money on medical treatments, simply because he or she would not have the sufficient means to do so. On a societal basis, proper infrastructure in order to provide medical treatment needs to be in place in order to ensure the supply of health care. Developing or least-developed nations will have great difficulties both in supplying public health care benefits, educating medical professionals, as well as building clinics or hospitals, or investing in medical technology. In addition, nation states that have difficulty supplying their inhabitants with sufficient levels of medical care will have a population characterized by low life expectancy, high child mortality rates, as well as a large portion of the potential work force incapable of fully partaking in it. These are all factors that are detrimental to further development, and keep poverty levels high. Poor health as an economic problem thus seems to have a snow ball effect, where a state in lack of a healthy and therefore capable work force cannot efficiently build infrastructure or institutions that would help increase health levels. Such states would not have the resources necessary to committing to this undertaking, and the resources to build and develop become increasingly sparse at this ‘snowball’ continues to roll, and perhaps even pick up speed.

Thomas Pogge argues that eradicating global poverty is an international responsibility rather than a strictly national one. If such is the case, then how we understand rights, and how we weigh them against each other, is of crucial importance to how we develop international agreements, and how we go about creating national as well as international law. Law can be said to be what ultimately regulates the supply and enforcement of all rights, as rights need a supplier – an *addressee* or a *guarantor* of

the right.⁷ Not comprehending the effects of intellectual property on the right to health, and through it the effect on global poverty, is disadvantageous when seeking to develop treaty and organizational design suitable to confront the issues at hand.

In the book *Freedom from Poverty as a Human Right – Who Owes What to the Very Poor?*, Thomas Pogge argues that even though diverging economic growth rates in countries are linked to specific local factors, clearly global factors play a role as well (Pogge 2007b: 32). In Pogge's own wording:

The traffic of international [...] economic transactions is profoundly shaped by an elaborate system of treaties and conventions about trade, investments, loans, patents, copyrights, trademarks, [...] and much else. These different aspects of the present global institutional order realize highly specific design decisions within a vast space of alternative design possibilities.

(Pogge 2007b: 32)

Pogge presents the argument that even though local factors do matter a great deal when battling poverty, researchers are not sufficiently concerned with the effects of international treaties and conventions on poverty and poverty related injustice. Pogge also asserts that there is too little emphasis put on research developing alternate, and perhaps more effective, treaty designs to further the work of poverty eradication. Further, he claims in an international policy analysis brief for the Friedrich Ebert Foundation, that: 'avoidable health deficits result in avoidable suffering, lack of physical and mental functioning, as well as premature death on a massive scale. Because most of these medical conditions cause economic losses that are much larger than what it would have cost to avoid or adequately treat these conditions, realizing the human right to health would actually increase human economic prosperity

⁷ An addressee or a guarantor of a right, is the holder of the correlative duty or burden to enforce the right, meaning provide the *object* of the right to the holder of the right (Lindholm 2013). This could, for example, be the state.

overall' (Pogge 2011: i). It is here that a normative discussion of how to prioritize rights comes into play. Although this thesis will not concern itself with the eradication of poverty specifically, the understanding of consequences of choices made when prioritizing one right over the other needs be further and deeper than that of regarding it as making a decision about a single issue. Prioritizing intellectual property rights, situated in international agreements, over a right to health is not related only to cost and supply of medicines, profit margins for pharmaceutical companies, or free trade. It is also linked to levels of global poverty and to moral considerations.

This thesis does not set out to discover if we are currently operating within a system design that optimally promotes and supports the goals we are trying to achieve. Rather, it will concern itself with the normative validity of different approaches with regards to how we prioritize. Goals are the realizations of interests; but are we working to promote the *right* interests? Answering this question might be considered an idealistic or even naïve undertaking, but the issue is nonetheless worthy of debate. It is my opinion that looking at the issue through the theoretical, normative frameworks, of John Rawls, Robert Nozick and Henry Shue, might bring us closer to an answer on what we should prioritize, and hence *what matters most*.

3 Justifying rights

In order to conduct, and also understand, an analysis of which right to give priority to in instances of conflict, we need to first look at some possible definitions for the two rights. A moral code or normative theory can only with great difficulty and poor results be applied to a question of prioritization if we do not first define what it is we are weighing against each other. As the theories that are to be used are quite different, and the original intent for neither of the authors was to answer the specific research question of this thesis, I am presented with the necessity of defining the different elements that will be made use of within the confines of these pages.

This will be done by firstly going through a distinction between human- and legal rights (chapter 3.1), before I move on to laying out some brief empirical proof that both the right to health and the right to intellectual property exist, and what they currently entail. The distinction between human- and legal rights will be made because I believe it is important that it is clear that they are not necessarily one and the same.

The chapter constituting *proof* of the existence of the rights in question is deemed relevant, as prioritizing between two rights is nonsensical if one or neither exist in the first place.

Chapter 3.2 will consist of a brief description of some of the problems that arise when seeking to ensure and supply both rights at the same time. Thus, I will be able to show the value of a normative discussion on which of the two rights to prioritize in instances of conflict, by relating it to a real life perspective of the present challenges. If the rights were not a source for debate or conflict, the discussion of which one to give preference to would not be a legitimate one. That is why this portion of the thesis is deemed necessary.

3.1 Difference between human rights and legal rights

Margaret Macdonald writes that natural rights have an extensive history stretching from the Stoics and Roman jurists, to the Atlantic Charter and Roosevelt's Four Freedoms. She also asserts that these rights are based on the idea that men are entitled to make certain claims, by virtue simply of their common humanity (Macdonald 1946–1947: 225).

As one can see from the year of publication for Macdonald's contribution, she would not have been able to include the Universal Declaration of Human Rights (UDHR) when she referred to the stretch of this history of natural right as it did not yet exist.⁸ However, the preamble of the UDHR states that the declaration is proclaimed based on the '[r]ecognition [that] the inherent dignity and [...] the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and that it is pledged by '[all Member States] to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms' (UDHR: Preamble). This is very much in line with the tradition Macdonald refers to, and although the *truth* of the idea of natural rights is not a foregone conclusion, it is the foundation for much of the thinking on human rights. This thinking '[it] tends to be renewed in crisis of human affairs' (Macdonald 1946-1947:225), and the lack of proper health care in many of the world's regions would constitute such a crisis of human affairs.

As stated by Tore Lindholm (2007: 398), a human right should 'derive from the inherent dignity of the human person'. If one believes that human dignity is something that is worthy of protection, then one needs also agree that there are some rights all humans (should) have, based solely on being human, in order to facilitate the protection of human dignity. This, as shown, finds support in the preamble of the

⁸ The Universal Declaration of Human Rights was not adopted by the United Nations until December 10th 1948 (Glendon 2002: XV).

UDHR. Following from this is that a human right is morally justifiable if it protects and upholds human dignity (Lauvset 2013). The implication of the notion of human dignity is also that there is something inalienable about human rights, as their function is to protect something inherent; something that does not disappear, and that is present in everyone. From this, it is evident that human rights, as opposed to legal rights, are not contingent upon existing laws enforcing them or a specific legal system, in order to be *true*. They are rights all human beings have, regardless of sex, race, religion, citizenship or other differences between individuals, even if legal systems are (not all) currently supplying, enforcing or guaranteeing the rights.

The idea of human dignity and likewise human rights, as stated before, is neither an unescapable opinion nor one held by all. The presence of the very idea; of international declarations, and of governmental and non-governmental, national- and international organizations promoting human rights, still, however, allows us to debate their comparative standing in relation to other rights.

In summation, a human right is: i) a right originating from the idea that human dignity is worthy of protection; ii) a right that will facilitate the protection of human dignity; and iii) the right is true, meaning valid and applicable, for all human beings, regardless of the legal standing of the right in question in some places.

Legal rights, on the other hand, are different from human rights, as they are dependent on a large array of varying factors. Most obvious here is the fact that different nations have different legal systems, and the rights supplied across nations therefore vary greatly. Legal rights are rights bestowed upon an individual by a specific legal system, and are thusly dependent on the structure and build of the

system, the location and legal standing of the individual⁹ – not the nature of the individual as a human being.

The most striking difference between a human right and a legal right is that the human right is true, universal and inalienable, whilst the legal right is dependent on an individual human being's location and standing within a legal system. Another prominent difference between the two is that only legal rights are truly enforceable. Therefore, whilst a human right is *true* for all human beings, it is not enforceable unless it is turned into a legal right. Interestingly, the right to intellectual property is a legal right – not a human right – which may in and of itself make it easier to enforce than the right to health

3.2 The right to health

In the following table 3.2.1 relevant articles from the UDHR and other conventions and declarations are presented, granting us with a foundation from where to start when discussing whether or not a human right to health exists, and what it entails.

What becomes evident, when looking at the excerpts presented in table 3.2.1, is that there is widespread agreement on the importance of a right to life. All of the declarations or conventions contain mentions of this right, and to varying degrees the documents also put forth definitions as to which rights people have in terms of health- and medical care. This common conception so becomes an argument in favor of a human right to health. Albeit *popularity* on its own being a poor justification for a human right, it does count towards it (Lauvset 2013).

⁹ The legal standing of an individual is important in relation to which legal rights are supplied to different persons within the same legal system. For example, a convicted felon, in many of the states of the US will have his or her right to vote removed – either for a period of time, or for the remainder of his or her life. ‘Most state constitutions still single out categories of people - [the] insane [and] felons - and deny voting to them. [...] Many state laws forbid those convicted of felonies from ever voting in elections, even after they have left prison and have served whatever probationary period was required’ (Ingram et al. 2007: 98–99).

Table 3.2.1: Human Right to Health in International Declarations and Conventions

Document	Article(s)	
Universal Declaration on Human Rights	Article 3: Everyone has the right to life, liberty and security of person.	Article 25, part 1: Everyone has the right to a standard of living adequate for the health and well-being [...] including [...] medical care and necessary social services, and the right to security in the event of [...] sickness [and/or] disability.
The American Convention on Human Rights	Article 4, part 1: Every person has the right to have his life respected. [...] No one shall be arbitrarily deprived of his life.	Article 16, part 1: Every individual shall have the right to enjoy the best attainable state of physical and mental health.
The African Charter on Human and Peoples Rights	Article 16, part 2: States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.	
The ASEAN Human Rights Declaration	Article 11: Every person has an inherent right to life which shall be protected by law. Article 28, part d): Every person has the right to an adequate standard of living for himself or herself [...] including [...] the right to medical care and necessary social services.	Article 29, part 1: Every person has the right to the enjoyment of the highest attainable standard of physical, mental and reproductive health, to basic and affordable health-care services, and to have access to medical facilities.
The European Social Charter	Article 11: With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, [...] appropriate measures designed [...]: to remove as far as possible the causes of ill-health; [...] to prevent as far as possible epidemic, endemic and other diseases.	

Source: Universal Declaration of Human Rights, The American Convention on Human Rights, The African Charter on Human and Peoples' Rights, The ASEAN Human Rights Declaration, The European Social Charter.

When it comes to justifying a specific human right, such as the right to health, James W. Nickel in *Making Sense of Human Rights* constructed a framework for how to go about this process. This framework can be used in order to distinguish between those rights that are to be considered human rights, and those that are not. Nickel presents six different criteria a human right must be able to meet and pass in order to be considered both applicable and universal.

These are six criteria are: 1) Are the threats the right protect against substantial and recurrent?; 2) Is what the right protects against important?; 3) Can it be a universal right?; 4) Would some weaker norm be as effective?; 5) Are the burdens justifiable?; and 6) Is it feasible in a majority of countries? (Nickel 2007:70–79). I will in the following view the right to health through this framework, in order to present some evidence as to the viability of the right to health as a human right.

Viewing the right to health through Nickel’s framework for justification we can assert that point 1 through 3 is fulfilled.¹⁰ My argument here is as follows: A lack of protection for health is both a substantial and recurrent problem, *cf.* the arguments alluded to in chapter 2.2, regarding global poverty considerations and widespread debate on the matter, and a right to health is important because it would in all likelihood help ensure the right to life (referring to point 1 and 2 of Nickel’s framework). The right to health can be considered universal, as it has human beings as beneficiaries, has governments as its primary addressee, has high priority due to its benefit on the basic right to life, and can

¹⁰ The initial arguments of this paragraph, concerning point 1 through 3, is developed from a similar justification presented in my term paper from the class Human Rights, Ideologies and Political Regimes, titled ‘The Universal Human Rights to Intellectual Property and Health: Do They Exist and Can They Be Enforced Simultaneously?’, presented as an exam paper in the spring of 2013. The arguments have been expanded and altered, and the evaluation of point 4 through 6 is presented for the first time in this thesis.

apply around the world – as health is a question that makes sense in the context of any nation or time period, referring to point 3 (ibid: 75).¹¹

Regarding the fourth point, on deciding whether or not a weaker norm than a human right would be as effective, any answer would be no more than a highly uncertain assumption, given the comprehensive efforts required to build an infrastructure that provides health care and medical treatment to all. As can be seen, when delving into the subject matter, there is no consensus on how to, or even if one should, supply health care to all, *cf.* the debate on the Affordable Care Act in the United States of America.¹² Considering this lack of agreement on the issue, it is difficult to imagine a comprehensive effort being taken, if the argument to do so was not grounded in a reliable and persuasive foundation. Katheryn Sikkink (2011)¹³ argues that human rights have seen an immense increase in importance, adherence and support over the last few decades. It is one of the normative theories, or moral codes, that is gaining considerable support the fastest, and most widespread. As evidence for this claim, she presents an increase in the prosecution of human right violators, and the prosecution of previous heads-of-state for such crimes; something that was until recently both unthinkable and unheard of. In addition, the creation of an International Criminal Court, the International Court of Justice, as well as the international tribunals of the former Yugoslavia, and Rwanda gives support to the argument that a concern for human rights is on the rise. Seeing as human rights as an idea is gaining reputability and support, linking the supply of health care to that, is a strategy that might prove useful. Not only that, but also in line with point 4 of Nickel's framework, be the only type of norm system elaborate and well-respected enough to provide enough ballast to

¹¹ The criteria listed here are James W. Nickel's criteria for deciding whether or not a right can be considered a universal right, Nickel 2007: 75.

¹² See footnote 2, located in chapter 1.1 Research question.

¹³ This is one of the main points made by Katheryn Sikkink in her book *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*.

ensure enforcement. It is therefore my careful conclusion that other norms, though they might suffice, would not be as efficient as linking a right to health to human rights.

Point 5 of Nickel's framework is relating to whether or not the burdens of instituting the right as a human right are justifiable or not. This criteria being fulfilled is dependent on how one distributes the costs of supplying all human beings with an *enforceable version* of the right, and what kind of benefit one is able to obtain through supplying the right. Several different ideas have been presented as to how to go about financing the endeavor of providing a global access to health care and thus a human right to health. An example here is Thomas Pogge's idea of a 'Health Impact Fund' (HIF) (Pogge 2011).

The HIF is a 'pay-for-performance mechanism', where patent holders or innovators register their medicines and undertake to make them available at no more than the lowest feasible cost of production and distribution. The innovators would also allow for generic production of registered medicines. As payment or incentive to enter into this fund, the innovators would be compensated with a sum dependent on the individual drug's impact on global health. Pogge suggests an initial remuneration sum on the fund's yearly budget of €4.5 billion – making the potential earnings for innovators registering their medications considerable. Another possible way of distributing costs, similar to that of Pogge's Health Impact Fund, is presented by Jessica Greenbaum. Her proposed solution would be to create a WTO Remuneration Fund, where nations exporting medicines under the Paragraph 6 Waiver¹⁴ would not

¹⁴ In November of 2001 the WTO arranged a round on trade relations in Doha, Qatar, known as 'the Doha Round' or the 'Doha Development Agenda' which led to the Declaration on the TRIPS Agreement and Public Health. This was further specified in 2003 with the General Council Decision on TRIPS and Public Health, which constitutes the Paragraph 6 Waiver (Greenbaum 2008: 148–150). It was adopted by the WTO General Council on 30 August 2003 (WHO 2013b). What the paragraph constitutes is a waiver of the export restriction in Article 31(f) of the TRIPS agreement (WTO 1994), allowing for the total amount of production done under compulsory licensing to be exported to other nations. Significant here is that when a country produces medicines under compulsory license, it is the responsibility of the 'producing nation' to provide remuneration to the pharmaceutical company that owns the patent – these costs are not a concern

have to pay remuneration to the pharmaceutical industry – but payment would instead come out of a joint WTO fund contributed to by all WTO member states.

As whether or not point 5 of Nickel’s framework is fulfilled is dependent upon the allocation of costs and amount of (potential) benefit, I find it unwise to make a firm assertion on this point being fulfilled, when considering the justification of health as a human right. Suffice to say, by allocating the costs in a sustainable and (more) fair way, one would fulfil Nickel’s criteria. I believe Nickel did not sufficiently consider the problematic nature of how hypothetical the answer to this question would be, as it is impossible to decide if the costs are justified, without actually calculating and dividing up the costs, or even setting the wheels in motion. What these costs would amount to is incalculable without choosing a system of cost distribution, making the costs justifiable if they are divided *correctly* and not justifiable if divided *incorrectly*.

Point 6 of Nickel’s framework suffers from the same kind of hypothetical question formulation as point 5. The feasibility of elevating health to the status of a human right is dependent on how it is done, and who will take on the costs. Pogge’s Health Impact Fund and Greenbaum’s WTO Remuneration Fund could potentially go a long way in making it feasible in a majority of nations. Whether or not the burdens are justifiable or if it is feasible to enforce such a right depend not only on who would take on the burdens, but also on a joint conception of what a human right to health should entail. To make any assertions on the reach and limitations of such a right is very difficult. But, one could make the argument that it at the very least should be a right providing access to health care and medical/pharmaceutical treatment in order to prevent life-threatening disease and injury, both of which could potentially be achieved through Pogge or Greenbaum’s alternative cost distribution schemes.

for the importing country. It is these cost Jessica Greenbaum suggests moving from the exporting country, to the WTO Remuneration Fund.

From this discussion, I will conclude that a right to health can be considered a human right, as it does pass through Nickel's six criteria, even if not unscathed. The human right to health will for the remainder of this thesis be thought of as a right to medical treatment for life-threatening disease and injury, as well as access to preventive health and medical care.

3.3 The right to intellectual property¹⁵

The question of whether or not there are rights to intellectual property is one that has a clear, resounding answer. Intellectual property rights have been prevalent in both domestic and international law for over 500 years, beginning with the first recorded patent law in Venice, Italy from 1474 (Drahoš 1998:3). Most international declarations and conventions regarding human rights also contain within them mentions of property rights, as well as rights to intellectual property. It is noteworthy that the documents from the regions Africa, the Americas and Asia have specified, more so than the UDHR and the European counter-part *The European Convention on Human Rights*, that intellectual property should be thought of as both personal property, as well as in the sense of being a public good. In table 3.3.1 I have presented an overview of excerpts from some of these international rights declarations, in order to show the presence of an international acknowledgement of (intellectual) property rights.

The existence of intellectual property rights may, for reason displayed above, not be a topic of much debate. However, what is a topic of continuous controversy is what intellectual property rights entail and how they are to be defined, who the beneficiaries are, and how the rights are to be enforced. It is not my contention to try and prove intellectual

¹⁵ This chapter, similarly to chapter 3.2, contains some building blocks first assembled in constructing the arguments for my term paper in the class Human Rights, Ideologies and Political Regimes (see footnote 10). However, it has been expanded and altered since.

Table 3.3.1 The Right to (Intellectual) Property in International Declarations

Document	Article(s)	
The Universal Declaration of Human Rights	Article 17, part 1: Everyone has the right to own property alone as well as in association with others.	Article 27, part 2: Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
The African Charter on Human and Peoples' Rights	Article 14: The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.	
The American Convention on Human Rights	Article 21, part 1: Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.	Article 21, part 2: No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
ASEAN Human Rights Declaration	Article 17: Every person has the right to own, use, dispose of and give that person's lawfully acquired possessions alone or in association with others. No person shall be arbitrarily deprived of such property.	Article 32: Every person has the right, individually or in association with others, to freely take part in [...] the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or appropriate artistic production of which one is the author.
The European Convention on Human Rights, Protocol 1	Article 1: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.	

Source: The Universal Declaration of Human Rights, The African Charter of Human and Peoples' Rights, The American Convention on Human Rights, the ASEAN Human Rights Declaration, The European Convention on Human Rights, Protocol 1.

property rights as a human right. Having the right to intellectual property pass through Nickel's framework of justification would fail already at the third point. A right to intellectual property does not fulfil the fourth point either, as it is not considered a human right today, and 'weaker norms' (meaning laws) are already protecting the right quite effectively and efficiently, through for example the agreement on Trade Related Aspects of Intellectual Property in the WTO.

A right to intellectual property will within the confines of this thesis be understood as the (legal) right to obtain monetary or some other kind of (material) compensation resulting from any scientific, literary or artistic production (UDHR, Article 17), with special emphasis on the *scientific* – as that is the portion that is the most relevant in relation to health care and medical treatment (Lauvset 2013). Intellectual property rights will thus be defined as the claim right to being remunerated for work efforts and ideas, resulting in a product.

3.4 Barriers to ensuring both rights simultaneously¹⁶

I have earlier gone through the difference between human rights and legal rights. To reiterate those points, a human right is inalienable and true for all human beings regardless of their legal standing and relationship to a legal system; whilst a legal right is dependent on a legal system providing the right. These two types of rights can exist parallel to each other, without being in conflict, and many times legal rights lay out in practical terms what human rights state, such as the right to vote, the right to free assembly, the right to free speech, or right to freedom of religion, within many nation's legal systems. The problem of a conflict of interest does not arise until one

¹⁶ Chapter 3.4 contains some of the same findings, formulations and conclusions as my exam paper for the class 'Human Rights, Ideologies and Political Regimes' in the spring of 2013, titled 'The Universal Human Rights to Intellectual Property and Health: Do They Exist and Can They Be Enforced Simultaneously?'

tries to enforce different rights at the same time that are contradictory to each other, or where the promotion of one right might lead to the breaking of another.

According to Tore Lindholm (2013) for a right to be enforceable it needs to have an addressee in charge of supplying the right. In the case of both the human right to health and the legal right to intellectual property this addressee would be the state through its legal system. A state signatory to one or more of the declarations mentioned earlier, and a member of the WTO and signatory to TRIPS, becomes addressee of the two rights, and so has the duty to uphold them both at the same time. This means that a state needs to take into consideration the legal framework regulation both access to health– and medical services, and patent laws regulating intellectual property rights, when deciding how to go create a legal system that grants and protects both of the rights for its population (Lauvset 2013).

In order to supply its inhabitants with a health care system that covers everyone to the minimal extent of preventing death, given how I previously defined the human right to health for the purposes of this thesis, it is not unthinkable that infringing on the right to intellectual property or some of the articles in the TRIPS agreement might seem an optional course of action for a nation attempting to improve access to health care.

One example that can serve to illustrate this is the Indian Supreme Court decision of April 2013, to not issue a patent in India in the case of the cancer drug *Gleevec*. India's highest court rejected a request for patenting the drug *Gleevec* (Bollyky 2013) and thus allowing for the production of generic drugs using the same content fabrication as the original manufacturer *Gleevec*. These generic versions could then in turn be provided to India's largely poor population at a fraction of the cost of the name-brand pharmaceutical. It is debatable why this decision was made, depending on which laws and regulations in the Indian legal system one interprets and emphasizes. Politically, however, one possible reason is that this could have been done in order to promote access to health care and medical treatment, and thus the human right to health in India. At the same time it is argued, not surprisingly, by for instance the owners of *Gleevec*, that it is in violation of the TRIPS agreement, to

which India is a signatory (Bollyky 2013). This could be one among many other efforts taken by the Indian state in order to provide its population with a more affordable health care system, state-of-the-art medical treatments and a human right to health.

Another example can be gained by looking at Emily Saslow's contribution to the debate from 1999, discussing the then current situation in terms of AIDS medication availability in South Africa, focusing on the nation's use of compulsory licensing.¹⁷ South Africa passed legislation in 1997 '[i]n response to the plague-like proportions of the HIV and AIDS epidemic [...] to provide for measures for the supply of more affordable medicines in certain circumstances' (Bombach 2001: 273). The legislation was signed into law by recently deceased Nelson Mandela, then president of South Africa, in December of the same year (Saslow 1999: 578). The amended law would permit both compulsory licensing and parallel importation¹⁸ to be approved by the Minister of Health (ibid). The amendment was known as article 15(C) of the South African Medicines Act (SAMA). It opened up for prescribing conditions in which

¹⁷ Article 30 of the TRIPS agreement states that: 'Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties' (WTO 1994). It is this article that opens up for *compulsory licensing*. This means that a nation can set aside the patent on a product without requiring the consent of the patent holder (WTO 2013b), so that the product is not considered patented, in the traditional way of understanding it, within the nation in question. One or more companies are then allowed to make use of the 'recipe' for the medication and produce generic versions of it. This will in turn remove the some of the justification of charging high prices for the product, as there is lesser or no need in cases such cases to fund a research and development department. Manufacturing may also be done at a lower cost, given for example the differences in wages between countries.

¹⁸ Parallel importation is in Saslow (1999: 578) referred to as 'international bargain shopping'. What it means, in practical terms, is for a government to investigate the price of any given drug in countries around the world, and then import it from the country where the price is the lowest, instead of buying medications directly from pharmaceutical companies. This is a course of action that could significantly reduce the costs of medicines. For example, the two antiretroviral medicines acyclovir and nevirapine cost twice as much in Kenya and 35 per cent more in Tanzania than they do in Norway – a 'price differential that equates to 500 hour's worth of work for a Tanzanian worker compared to an hour's worth of wages for a Norwegian' (Crook 2005: 24).

access to more affordable medicines would be ensured by not extending patent rights to medication that could help ensure public health (ibid). The South African Minister of Health would under this amendment have the right to decide that medications with the same treatment capabilities and make-up as a medication falling under the description of ‘being able to protect public health’ could be imported (ibid). This could potentially open up for importation of generic drugs – or so-called grey importation.¹⁹

At the time as Saslow published her research, the legislation described above had been both passed and signed into law, yet had not yet taken effect due to disputes over patent law and international trade obligations both nationally and internationally (ibid: 579). This dispute was due to the vast amount of possibilities for interpretation of the TRIPS agreement, when it came to national legislation on patent protection (ibid). Depending on the interpretation of the agreement, South Africa could both be considered perfectly within the boundaries of what the agreement allowed for; or, the new legislation could be considered unlawful. According to Saslow, the dispute lies in how far-reaching intellectual property right protection should be under international law, cf. the controversy stated in the beginning of this subchapter.

What is especially interesting about Saslow’s research for this thesis is the reaction of the pharmaceutical industry both in South Africa, Europe and the US after the 15(C) amendment to the SAMA, and what it shows about the difficulty for a state, as the addressee of a right, of providing both rights at the same time.

¹⁹ Grey importation can only happen in conjunction with compulsory licensing. When a nation decides to produce or allow for production of generic medications, these drugs, before the Paragraph 6 Waiver, had to be distributed within the borders of the nation where production took place. However, under the Paragraph 6 Waiver grey importation is allowed. The export restriction was removed for countries fulfilling a certain set of criteria, so that in contrast to the agreement as it stood before, developing nations could import generic drugs manufactured in other nations under compulsory licensing. This means that the cost of medicine and drugs with the same treatment capabilities as name-brand antiretroviral treatments could potentially be significantly reduced, and in turn become available to a large group of people who previously did not have access due to lack of resources.

The pharmaceutical industry in the United States, represented by the Pharmaceutical Research and Manufacturers of America (PhRMA), interprets the TRIPS agreement to be protective of intellectual property and patent rights, as this would ensure continued profits for the industry. The reaction of the pharmaceutical industry in South Africa, the US, and Europe to the 15(C) amendment was to launch a legal challenge to it in the South African Constitutional Court, as they stood to lose income in South Africa first, and then in the rest of the world. PhRMA stated that:

[T]he recent posture of the South African government makes it clear that South Africa intends to pursue a policy of weakening essential protection for patented pharmaceutical products [...]. From recent remarks and actions, the apparent intent of the government of South Africa is not only to defend its diminishment of the effectiveness of patent protection in South Africa, but to urge other countries to similarly weaken patent protection for pharmaceutical products.

(Saslow 1999: 580)

Notably, the Office of the United States Trade Representative also put South Africa on a *Special 301 Watch List* due to their (alleged) lack of compliance with the TRIPS agreement. This, in the strictest form of understanding, does not in and of itself constitute actual trade sanctions, but ‘being on the list [is] considered a trade sanction, because the US government is advertising [that] the country [is] an investment risk’ (Saslow 1999: 581).

Jessica Greenbaum (2008) argues that competing interests between patent holders and developing countries is the main obstacle to providing accessible health care for all. The interesting point she brings forth is that current amendments to the TRIPS agreement, constructed to facilitate better access to medical care, are not being made use of by nations. According to Greenbaum the only developing nation that had, by the end of 2008, made use of the Paragraph 6 Waiver, was Rwanda. She points out, perhaps legitimately so, that this suggests the waiver and other alleviating alteration efforts to TRIPS, had not achieved their desired results (ibid: 143–144). One of the

arguments Greenbaum makes regarding the importance of the P6W is that it opened up for grey importation. Before the inclusion of the P6W, grey importation was technically allowed – as nations could import generic drugs manufactured in other nations. However, to export generic drugs was *illegal* under the TRIPS agreement as it stood (ibid: 145). This is an example where the (unintended) effects of one law or agreement phrasing becomes nullifying on the potential gain of something that is not illegal. A similar example could be the logic of the Norwegian criminalization of purchasing sexual favors. To buy is illegal, whilst to sell is not²⁰. This means that even though prostitution is legal, the transaction as a whole is not – much like the dilemma of grey importation before the Paragraph 6 Waiver. Greenbaum suggests that the reluctance to make use of this amendment, is based on lingering tensions and the belief that sanctions could be imposed on countries that make use of the amendment, regardless of the legality (Greenbaum 2008: 149–150; Shadlen 2004: 90). In addition, there are no official guidelines for how to implement legislation that allows for compulsory licensing, or how to become an import or export country whilst still being *in line* with the TRIPS agreement. Neither are *potential* export countries incentivized to become actual export countries, as they are the ones left paying remuneration costs and could because of it (possibly) be left without any financial winnings from producing or exporting medication. All of these arguments point towards a difficulty of promoting and ensuring a human right to health, originating from difficulties in doing so whilst complying with the legal framework governing intellectual property rights.

²⁰ Whilst the Norwegian criminalization of purchasing sexual favors could serve as an example of a similar kind of logic, it is important to note that the legality/illegality distribution of buying and selling is reverse to that of grey importation. Before the Paragraph 6 Waiver it was illegal to sell generic medicines, not to buy them.

The problems of ensuring both rights at the same time thereby become:

1. The state is the addressee and supplier of both rights, and may have to prioritize one right over the other.
2. There are enormous differences in the availability of – and access to – health and medical treatment due to differences in material wealth between nations.
3. Interests of intellectual property right holders and the interests of those requiring medical treatment are (polar) opposites in terms of cost.
4. Even when amendments are made to agreements governing intellectual property rights, in order to facilitate the promotion of a human right to health care, these are not being used, due to:
 - i. Fear of sanctions
 - ii. No existing guidelines for implementation of legislation incorporating and promoting both rights
 - iii. Lack of incentives to become export countries, as these have to pay remuneration costs under the current regime

(Lauvset 2013, Greenbaum 2008)

With these difficulties of simultaneous enforcement in mind, I move on to the theoretical chapter of this thesis.

4 Theory

Chapter 4 of this thesis will outline and give a summation of the theories from the political philosophers John Rawls, Robert Nozick and Henry Shue. This will be done in order to better be able to make use of the varying philosophical directions and arguments in the analysis immediately following this chapter. The summation will limit itself to those points that shall be useful in the further discussion, yet not be completely exhaustive in relation to my use of points made and lines quoted from the respective political philosophers.

The overview of the three theories will as such constitute a description of the main ideas and views presented by the different scholars, and thus the theoretical framework for the further discussion.

4.1 Rawls: Fair and equal rights

According to Martha Nussbaum, ‘John Rawls [...] is the most distinguished moral and political philosopher of our age’ (Nussbaum 2001:1). His ideas as to what makes a society just and how justice is connected to an individual’s pursuit of the good life, inspired an era in political philosophy and political thinking with a greater focus on justice, respect and liberty (ibid.: 2).

What Nussbaum means when mentioning this ‘inspiration’ originating from Rawls is first and foremost his work *A Theory of Justice* published in 1971²¹, but also *The Law of Peoples* from 1993 and *The Idea of Public Reason Revisited* from 1999. In *A Theory of Justice* Rawls provides us with an alternative to what he calls ‘standard utilitarianism’ and his political philosophy joins the ranks of other contractarian

²¹ The version of *A Theory of Justice* I make use of in this thesis was printed in 1973, and so the references bear this year, rather than 1971 – the original year of publication.

theories.²² Social contract theory, the dominant theory of justice in the western tradition, views principles of justice as the result of a contract people make, for mutual advantage, in order to leave the state of nature and govern themselves through different versions of a legal system (Nussbaum 2004: 4).

A Theory of Justice and the governing ideas it outlines originates behind what John Rawls refers to as *the veil of ignorance*. This is an abstract concept, where from behind the imagined veil, information is hidden from human beings. John Rawls refers to this state as the *original position*, and puts forth that a state of hidden information is the preferred way of interpreting and making use of an original position (Rawls 1973: 18–19). The original position ‘is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair’ (Rawls 1973: 17). By information being hidden, it is imagined that behind the veil of ignorance, no man or woman knows anything about his or her own relative standing in society as a whole. He knows not whether he is rich or poor, if he is healthy or ill, powerful or powerless. It is under these limitations of knowledge and information constraints that John Rawls presents his theory of which governing principles rational individuals would choose.

Rawls expects people to choose or discover a set of principles to govern societies, based on the notion that they know nothing of their relative standing to each other. Rawls makes use of this veil of ignorance, in order to prove to the reader that there are certain rights, rules and principles we would all, as rational beings, agree to as the

²² ‘Contractarian theories’ refer to different versions of social contract theory, as described briefly in the passage above. These are theories regarding the organization of societies, where the members enter into a *social contract* defining the norms, rules and laws to abide- and live by. They do not (necessarily) constitute real life contracts, but rather symbolize the concept of members of a society agreeing to a way of arranging social interaction, and how to let themselves be governed. Other examples of social contract theorists are John Locke, Thomas Hobbes, Jean-Jacques Rousseau and David Gauthier. For more on social contract theory or its proponents see entry in the Internet Encyclopedia of Philosophy, available at: <<http://www.iep.utm.edu/soc-cont/>> [last accessed 20 May 2014].

best foundation, if we were not tainted by self interest based on our own social and economic standing in a specific (type of) society. This would remove the chance of people agreeing to principles that would be rational to choose only ‘if one knew certain things that are irrelevant from the *standpoint of justice*’ (Rawls 1973: 18, my own emphasize). Rawls wants to make clear that ‘one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other [...]’ (Rawls 1973: 17). By eliminating people’s possibilities or incentives to choose rights and duties that would benefit them due to their position in the system, Rawls believes we are to come closer to a *truly just system*. Without information that could let decisions be governed by self interest, rational beings will choose principles that are to everyone’s best interest, and that are just – and so will constitute a more reasonable conception of justice.

The principles that originate from this thought experiment behind a veil of ignorance are in the opinion of Rawls *the liberty principle* and the *difference principle*. These two principles state that ‘First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others’. (Rawls 1973: 60), and that ‘Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open for all.’ (ibid.)

The first point indicates that all that are bound by the social contract will have the same rights, to the same extent, and that no one’s rights will be of such a nature that to make use of them would prohibit or hinder someone else from using their rights. The second point, which is divided into two sub points, entails that inequalities are to be distributed in such a way that they are to the best possible result for those that will have the worst outcome of those bound by the social contract, and that the offices and positions that govern the society should be open to all.

When Rawls moves on to discuss the implications of these principles on international relations, he does so in *The Law of Peoples*. Here, Rawls applies a similar set of

restrictions to different peoples' knowledge about their relative standing to each other, and suggests which governing principles and foundations for international agreements and the relations between peoples can be accepted, in a truly just community or *society* of peoples²³. Rawls is in this publication only concerned with (liberal) democracies, or decent states²⁴ - and not those states that are not governed through principles not in line with democracy and fundamental freedoms. He calls this Society of Peoples a 'realistic utopia'. By realistic utopia, John Rawls is referring to that his work depicts 'an achievable social world that combines political right and justice for all liberal and decent peoples [...]. (Rawls 1999: 6). The Society of Peoples would be governed by the following principles of justice:

- 1) Peoples are free and independent, and their freedom and independence are to be respected by other peoples
- 2) Peoples are to observe treaties and undertakings
- 3) Peoples are equal and are parties to agreements that bind them
- 4) Peoples are to observe a duty of non-intervention
- 5) Peoples have the right to self-defense, but no right to instigate war for reasons other than self-defense
- 6) Peoples are to honor human rights
- 7) Peoples are to observe certain specified restrictions in the conduct of war
- 8) Peoples have duties to assist other peoples living under unfavorable conditions that prevent their having a just of decent political and social regime

(Rawls 1999: 37)

²³ Rawls talks of a Society of Peoples, rather than a society of states. He does so because he in his work is referring to the different peoples as actors, and not states. Just as citizens are the actors in domestic societies, liberal democratic peoples and decent peoples are the actors in the Society of Peoples (Rawls 1999: 23).

²⁴ By the wording of 'decent states', Rawls is referring to states that are non-liberal, but whose basic institutions meet certain specified conditions for political rights and justice, such as the right for people to play a substantial role in the governing of themselves and to make political decisions, for example through participation in associations and groups (Rawls 1999: 3).

This list, though incomplete according to its author, describes how the relations between different peoples should be in Rawls's 'realistic utopia'.

In *The Law of Peoples* John Rawls also states that injustice and the great evils of history do not come from discrepancies in the level of resources between nations, but from some societies lacking justice – in shape of just institutions. Political injustice, he states, has been the cause of 'war and oppression, religious prosecution and the denial of liberty of conscience, starvation and poverty, genocide and mass murder' (Rawls 1999: 6–7).

4.2 Nozick: Property rights

Robert Nozick's publication *Anarchy, State and Utopia*, published in 1974, debates the legitimacy of a government with regards to its reach and involvement in the individual person's life. According to Nozick, the minimal state, whose only responsibility and power it is to protect people's right to govern their own lives, preserve their liberty, and ensure people can protect their own property, is a just state. No other form of state, or amount of centralized power could be considered legitimate. Nozick refers to this type of state as the (minimal) *night-watchman state* (Nozick 1974: 26). Nozick clearly writes out (1974: 149) that: 'the minimal state is the most extensive state that can be justified. Any more extensive state violates people's rights.'

Nozick draws a picture in order to present his theory, where individuals exist in a state of nature, in much of the same way as Rawls's starting point is also a state of nature. In Nozick's state of nature, individuals are free and can make use of their property in which ever way they find best. They can do so only if they at the same time agree to respect the interests and rights of others, meaning that their use of their property does not prohibit, or take away, others' possibility to use theirs. But, at this point conflict will arise in Nozick's state of nature (Nozick 1974: 10–12). Some individuals will behave in ways that will limit other people's opportunity to be free and do as they wish. Because of this, people will form alliances where their collective

action allows them to enforce their rights (Nozick 1974: 12–15). And thus, through collective action and agreements on how to behave and how rights and duties are to be enforced, states come to be. Nozick believes that this way for a state to emerge will not infringe on any individual's freedom, and the result is consequently just.

In terms of property rights, Nozick is a strong proponent of these. He believes that the right to property, and the duty of the state to protect property from being arbitrarily taken away from individuals, is absolutely fundamental to a just state. A just state would only arise if the intention was for it to, among other things, protect people's property and protect against theft – and if the state does not do so, it is by no means just. Nozick also argues that any state that seizes or takes away an individual's property, either by taxing earnings or taking hold of the property in question, without obtaining the person's consent, unjust (Nozick 1974: 149). The state is in this instance unjust, even if the property was taken away, or the tax was demanded, in order to achieve distributive justice among all individuals.

Further, property can according to Nozick be obtained in two ways. He calls the righteous obtainment of property the *principle of justice in acquisition*. An individual can obtain property by having the 'original acquisition of holdings', understood as becoming the owner of something that is not previously owned by anyone, or he or she can have property transferred from someone that used to own it, for example through inheritance or a sale (Nozick 1974: 150). Significantly, any new distribution that arises from Nozick's three principles of transference holdings, is just. These principles are:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding
2. A person who acquires a holding in accordance with the principle of justice in transfer, from some one else entitled to the holding, is entitled to that holding
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.

(Nozick 1974: 151)

The relative distribution of wealth is just if it is brought about through voluntary action by individuals in a free and open market. This means that Nozick views all forms of redistributive efforts by a government to be unjust, and a breach of the individual's right to self-government and personal property.

4.3 Shue: Basic rights

The work by Henry Shue that will figure in this thesis is *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*. Here, Shue takes the stand saying that major international human rights documents often artificially divide different (kinds of) rights into categories, such as 'civil and political rights' and 'economic, social and cultural rights', and that this division leads to an understanding that one set is more important than the other, based on within which document they are placed. Different documents are ratified by different countries and at different times, making this designation of relative importance even easier to believe, even though the ratification process is, if not usually then at least often, based on other concerns – such as economical considerations, or feasibility of enforcement. As an example, he points to the two International Covenants: The International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights – covenants of rights that originate out of the Universal Declaration of Human Rights (Shue 1996: 8). Shue is opposed to this division, and rather believes it to be illegitimate. According to Shue, focus on the fulfilment and enforcement of rights across the globe, and their relative need for priority, should not be on one arbitrarily defined set of rights, but rather on what he calls a fundamental core of rights.

This core of basic rights would contain subsistence rights, rights to liberty and rights to security (Shue 1996: 5–9). Subsistence rights, as Shue defines them, fall under the category of what is more commonly known as *economic rights*. The declaration of all economic, social and cultural rights, no matter how vital their fulfillment is, as less genuine rights, with less binding duties, Shue states is 'intellectual bankruptcy' (ibid.: 6).

Moving on, Shue writes about the definition of a right, and how it is the foundation to make (legitimate) claims or present a justified demand in relation to others. His definition looks as follows: '[A] right provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats.' (ibid.: 13). Here, Shue explains that a justified demand is a demand all people with the right have against others, yet he does not define which *others* he is referring to. Most likely, the lack of a specific definition of these 'others' is due to the varying instances in which people can claim to have rights – be it in relation to a government, in relation to other individuals, or as human beings in the international community. When Shue seeks to define a right in a more literary poetic sense, he draws upon a quote by American legal scholar and political philosopher Joel Feinberg:

[R]ights are not mere gifts or favors, motivated by love or pity, for which gratitude is the sole fitting response. A right is something that can be demanded or insisted upon without embarrassment or shame. When that to which one has a right to is not forthcoming, the appropriate reaction is indignation; when it is duly given there is no reason for gratitude, since it is simply one's own or one's due that one received.

(Joel Feinberg, quoted in Shue 1996: 15)

Shue believes this to be true of at least basic moral rights, and that a right providing a rational basis for a justified demand to enjoy something more than the right in and of itself, to be the most neglected element of rights: More specifically, a right is not a right to enjoy the right in question, but a right to enjoy *something else* – like food or liberty (Shue 1996: 15).

More precisely, when Shue speaks of basic rights, he means rights that no self-respecting person can reasonably be expected to relinquish, because the absence thereof is tantamount to accepting the removal of all rights. This means that a basic right is a right upon which all other rights depend – rights without which individuals are not able to enjoy any other rights (ibid.: 19). With regards to what he defines as

basic subsistence rights, these are unpolluted air, unpolluted water, adequate (amount and quality) of food, adequate clothing, adequate shelter, and minimal preventive public health care. These are *enjoyments* needed in order to ensure a decent chance of a reasonably healthy and active life of more or less normal length (Shue 1996: 23), and constitute the minimum we should be able to accept and expect.

5 Analysis

In this part of my thesis, I will analyze what the theories of John Rawls, Robert Nozick and Henry Shue imply for the rights to intellectual property and to health, with regards to which of rights should have priority over the other in instances of conflict. I will also in this chapter put the arguments up against each other, and draw some conclusions about which arguments best holds up throughout.

5.1 On rights to intellectual property and health

5.1.1 Rawls

To not take Rawls's intentions too far, I believe it to be necessary to state that the author wrote that his '[...] principles primarily apply [...] to the basic structure of society. They are to govern the assignment of rights and duties to regulate the distribution of social and economic advantages'. Rawls did not set out to create a comprehensive list of which rights and duties should be granted and not, or in detail describe how these rights and duties should be upheld. There is, obviously, no instance in which he states that intellectual property rights should be prioritized over a right to health, or vice versa. What he does assert however, is that the first principle of justice mandates that any set of rights agreed upon must be equal for all, in order to be considered just. Also, he makes a point out of proclaiming that 'while the distribution of wealth and income need not be equal, it must be to everyone's advantage' (Rawls 1973: 61). I will come back to these two points in the following paragraphs.

As explained in chapter 4.1, under the veil of ignorance rational beings would reach two fundamental principles for the governing of society: The difference principle and the liberty principle. To reiterate, these are: 'First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others'. (Rawls 1973: 60), and 'Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open for all.' (ibid.)

Let me first look at the principle of equal rights for all, and how this principle is brought about in Rawls's theory on justice. Imagining people under a veil of ignorance is a strange concept that requires a bit of an imaginative leap. It is not easy to imagine beings that do not know their interests. Neither is it easy to imagine beings that can be fully rational, without knowing anything about their circumstances. We are taught that rational choice requires the consideration of interests, in order to be defined as such. Max Weber presents four versions of rational action – based on interests originating in either desired outcomes, values, emotions or tradition (Grimen 2007: 206–209). In order to accept Rawls's veil of ignorance, we therefore have to suppose that the actors behind this veil have at least a limited knowledge of what they are interested in. For example, the actors must know that pain and injustice is bad, as well as that pleasure and justice is good, and that they prefer the latter over the former. The veil of ignorance is perhaps not necessarily the best 'location' from where to reach answers and conclusions about conflicts of interest that present themselves in the real world – like the one I seek to answer in this thesis.

None the less, if we accept the premise of a veil of ignorance, and imagine one where all information about relative standing in a society is hidden, Rawls's conclusions seem sound if we grant the actors the minimal amount of knowledge put forth in the previous paragraph. Rational beings are not such gamblers that they would agree to a system where only a very few would have rights and liberties, whilst the rest had none, out of fear that they might turn out to be in the group of individuals that are left without.

Looking at this first principle that the actors would necessarily have to come to, that each person is entitled to the most extensive basic liberty, it tells us that people can be considered entitled to all kinds of rights, as long as they do not interfere with the rights of others. A right to health care as well as a right to intellectual property are thus both generally supported by this principle – as long as they do not interfere with each other in a negative way. If they interfere with each other, by default they will also result in one person's utilization of his or her rights being to the detriment of another person's utilization of his or her rights. If I make use of my right to

intellectual property that could negatively interfere with your right to health care or medical treatment – if I am the patent owner of the drug that you require. As was presented in chapter 3.4, in the real world – these rights do at times come into conflict with each other. Rawls therefore provides us with support for both rights in theory, but not necessarily in practice.

If we on the other hand imagine a veil of ignorance, similar to that of Rawls's, where information was hidden and rational beings were presented with the choice between a right to access to medical care or to rights of intellectual property, rational beings would choose a right to medical care.

Let me present this argument comprehensively, in a way where the potential threats to rational actors are more visible. Under this veil of ignorance, a rational actor would not know his or her standing in society. He or she would not know if he or she would be capable of inventing something that would need to be protected by intellectual property rights, and he or she would not know if he or she would be in need of medical care – or even what the access to medical care would be like. The actors would, however, know that they have a fundamental interest in avoiding suffering, and in staying alive. If one is threatened with either the possibility of having a disease and not being able to receive treatment, or missing out on earnings from a patent – the rational being would choose what constitutes a defense against the most serious threat – the alternative that presents the lesser gamble. The most serious threat in this case would be to not have access to medical care, as this could result in severe pain or death. Loosing out on earnings from something one invented would not be enjoyable, it could be considered exceedingly unfair, but one would in all likelihood not die. It can therefore be concluded that even though Rawls's theory of justice does not preclude the existence of a right to health and to intellectual property simultaneously, by using the same approach of a veil of ignorance – I find that rational beings would choose a right to health over a right to intellectual property, thereby making a right to health just, and what should be prioritized in Rawls's framework.

If we instead of using the veil of ignorance to determine this, but rather just let Rawls's state of nature stand on its own and define the principles of how we are to assign rights, we can suppose a type of society where both rights exist, like in the actual world. Moving, then, to another point in Rawls's publication, we might come to a different conclusion on which right his theory prescribes the prioritization of. Rawls states that:

These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that a departure from the institutions of equal liberty required by the first principle cannot be justified by, or compensated for, by greater social or economic advantages.

(Rawls 1973: 61)

What can be alluded from this statement, is that Rawls puts greater stress and importance on a system of rights being equal, than he does on the legitimacy of efforts that would ensure the economic and social advancement of parts of the population. I find that it is here important to note that the rights Rawls refers to as having to be equal, are more traditional, liberal rights – and not social or economic rights, as the right to health could be considered. I still, however, believe that due to his emphasize on rights having to be equal in order to be just, his theories support a right to health over a right to intellectual property. I have before concluded that Rawls would give priority to a right to health, if this was in conflict with a right to health, based on which right rational beings would choose behind a veil of ignorance. What this quote serves to prove is that Rawls would support a right to health, if equal to all, even if another right would (potentially) better the relative comfort and enjoyment of some.

As mentioned in chapter 4.1, Rawls in *The Law of Peoples* states that injustice and the *great evils of history* do not come from discrepancies in the level of resources between nations. They originate rather in some societies lacking justice – in the shape of just institutions, or a just political system. Political injustice, he states, has been the cause of 'war and oppression, religious prosecution and the denial of liberty of

conscience, starvation and poverty, genocide and mass murder' (Rawls 1999: 6–7). If we suppose that Rawls is correct in his assertion that poverty is caused by the lack of a just society, the conflict of interest between a right to health and to intellectual property takes on another form. If the access to medical care, as stated by Pogge²⁵, is so heavily interlinked with and dependent upon poverty levels – an assertion that seems quite plausible, then the conflict of interest would not necessarily be avoided by assigning higher importance to the right to health. Rather, we should prioritize the eradication of poverty through those means that are the most effective with regards to improving everyone's standing, across the board. As mentioned in the beginning of this sub chapter, it is of great importance to Rawls that the distribution of wealth and income is to the betterment of all, even if it is not equal. If the problem of low access to medical care is not originating from, or very emphasized, by the presence of a right to intellectual property, but rather from and by an unjust system, the right to intellectual property can not be considered to be the problem. However, if the right to intellectual property is creating great discrepancies in the level of wealth that are *not* rooted in an effort to increase the level of enjoyment for all – but rather the few – it cannot be supported by the framework presented in Rawls's *A Theory of Justice*.

5.1.2 Nozick

In the case of Robert Nozick's work, I believe it is needed to firstly assert that whilst Nozick is very much concerned with property rights, he does not specifically discuss *intellectual* property rights. I will make no claims as to the reasons for why he does not discuss them, but rather use his framework in order to try and discover what the it would entail for intellectual property rights.

Firstly, intellectual property rights are different from rights to other kinds of property, due to the very special concept they grant holding rights to. Intellectual property

²⁵ See chapter 2.2, on basic rights and global poverty.

rights are rights that ensure compensation to the inventor of something new, when this *something* is used by someone else. It is so the access to the potential earnings that arise from the utilization of an idea or a piece of work, that intellectual property rights protect. Hence, intellectual property rights are granted to researchers that publish a book, a musician that produces an album, the director of a movie, as well as to engineers that create tools, or a pharmaceutical company that develops a new kind of medicine. The notion that one may own an idea can to some seem strange, as an idea cannot be touched or felt, and when it is transferred, the original holder loses nothing of it. An idea or a thought can freely be shared by many, without that having any impact on the *amount* of the idea. Ideas are such perhaps the least finite ‘possession’ or resource imaginable.

However, if one is to create something and the idea for this ‘something’ is not protected, it is possible for anyone to make use of it – and the original inventor stands to gain nothing from the discovery or even from production. His or her work will have been of no personal gain. Intellectual property rights therefore, I believe, lay somewhere in between the realm of regular property rights, and the right to be compensated for ones work.

In his chapter on distributive justice, Nozick writes that:

There is no central distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out. What each person gets, he gets from others who give him in exchange for something, or as a gift. In a free society, diverse persons control different resources, and new holdings arise out of the voluntary exchanges and actions of persons.

(Nozick 1974: 149–150)

Here, I would like to focus on how Nozick refers to new holdings coming into existence. Intellectual property can be defined as such a *new* holding – because it came to be through the actions of persons. Even though ideas are not something

physical or *real* in the strictest sense of the word, they do need to be thought of or discovered in order to exist. Unlike physical objects, whose existence can be said to be definite and irrefutable, regardless of someone knowing about them or not, an idea does not exist until someone comes up with it.

Much like farmland is mere land until it is worked and such yields fruits, inventions do not exist before someone puts the work into making them. The fruits of a farm only exist because someone put the work into making it so, and medical inventions are only made because people put countless hours of work, as well as immense financial resources into research and development, to actually discover and create them. We would have no objection to a farmer claiming he owned the fruits produced on his farm, yet it does to many not come as natural to assert that a researcher owns the ‘fruits of his mind’ – be it a book, an machine or a new drug against hay-fever.

There are countless of actions that we believe people are entitled to be compensated for, even though the actions do not constitute the transference of property from one holder to another. The entire notion of a service industry is based on the concept that the work, or the time someone spends doing a task, is worthy of (monetary) compensation. In order for someone to repair your car or give you legal advice, you need to compensate them. Yet in many instances, they have not given you a single piece of physical matter that you could be said to be paying for. The reason I believe intellectual property rights lies somewhere in between regular property rights and rights to compensation for ones work, is this: For the mechanic to fix your car, he or she need not only do the actual task – but also needs to devote time to learning the specific skill set in order to know how to perform the task, as well as figure out what is wrong with your car. Whilst fixing the car is just an action, learning how to repair a vehicle is a mental process. A mental process I am unable, or perhaps only unwilling to perform, but that I am willing to pay someone else to carry out; a compensation for work that I believe the mechanic is justly entitled to. Likewise with the lawyer: He or she spent years studying the law, in order to be able to tell me how I should behave to best preserve my interests. These are services that I appreciate dearly, and that I need – and so I am willing to pay for them. When a researcher, or a company, lays down

efforts to create a drug – they do so not only because it might have a value on its own to create something new, or because it has value on its own to learn. They do it also, and perhaps mostly, in order to make money.

Nozick refers to what is presented in the previous paragraphs as a *traditional socialist view* of entitlement to holdings (1974: 154). This view constitutes the idea that whoever creates a holding is entitled to it. Nozick states that the view that workers are entitled to the product and full fruits of their labor, because they have earned it, is something he agrees with, and that a distribution is unjust if it does not present the workers with what they are entitled to. He agrees with this because it is true to the notion that earning and producing a holding makes you entitled to it – referring to the principle of *original acquisition of holdings*. He believes it greatly implausible that who created the holding should have no impact on who should hold it (Nozick 1974: 155). The alternative to this entitlement to holdings, or *entitlement principle*, is a *patterned principle* for the distribution of holdings (Nozick 155–164). Here, a government would continuously break into individual's lives, or the market, in order to ensure that the relative distribution of holdings stayed the same as which ever initial distribution was deemed proper and just. This, Nozick believes, greatly undermines not only free will, and the right to self-government, but also basic liberty, because actions are throughout governed by some other entity; an entity or a state that cannot be considered just in Nozick's view.

Further, Nozick looks at the traditional statement of 'to each according to his _____', and tries to fill in the blank with something that fits with his theoretical approach. He concludes that the most accurate version would be:

From each according to what he chooses to do, to each according to what he makes for himself (perhaps with the contracted aid of others) and what others choose to do for him and choose to give him of what they've been given previously (under the maxim) and haven't yet expended or transferred.

(Nozick 1974: 160)

Realizing that this might be a bit of a mouthful, he shortens his conclusion to: ‘From each as they choose, to each as they are chosen’ (ibid).

Because an idea is a product that it is possible to rehash and reuse indefinitely once it is known, there is no way to ensure that people are compensated for their intellectual work other than by creating a system where these ideas are thought of as physical things that one can claim ownership over. If not, the idea could simply be used by someone else, in order to create the exact same product. Intellectual property rights are rights to be compensated for ones work, based in the notion that ideas are *things*: things that should not be taken, in the same way that we believe it is wrong to take someone’s bicycle, their wallet or other possessions.

Moving back a bit, I wrote in chapter 4.2 that in Nozick’s view, one can become the holder of property in two ways. An individual can obtain property by having the ‘original acquisition of holdings’ – becoming the owner of something that is not previously owned by anyone, or – he or she can have property transferred from someone that used to own it, for example through inheritance or a sale (Nozick 1974: 150). Gaining intellectual property could then fall under both these categories of how to obtain a holding. If one comes up with an idea that is new, this idea can not be said to previously have been owned by anyone – and one has original acquisition of holding. There are also workings in place in (some) legal systems where one can buy a patent, or where the copyright of a book will fall to the inheritors of an author when the author passes away. This means that intellectual property rights are to some extent supported by Nozick’s theory in this aspect too, as well as in order to be compensated for work, even though the does not discuss them specifically.

Having concluded that intellectual property is supported by Nozick, I want to shift to looking at what his views are on property and redistribution thereof. Like mentioned in chapter 4.2, Nozick believes both taxation and other forms of redistribution, that are not voluntary, to be unjust. The most important assertion Nozick makes regarding this, in relation to my thesis, is that all state-enforced redistribution, is morally unjust. It is unjust, because it violates people’s right to freedom and property, and the state

takes on a role and a reach further than that of a state Nozick would classify as just and legitimate.

The entirety of Nozick's strong defense of property rights rests on an idea of an initial just distribution of holdings. If this initial distribution could be considered fair and just, whatever alterations brought about by human action later on, as long as these transactions were also fair and just, the distribution at any given time is to be considered just. This is an idea that finds support in Rawls's *Law of Peoples*.²⁶ The great problem here is that, even if we would agree with this notion, Nozick cannot point to a place in time where this initial distribution was made, or state that is this initial distribution was just for that matter. There has never been an initial or ideal distribution of assets, from which we could start at a level playing field. Therefore, there is no outset for the measurement of all further transactions, to decide if these are just. Individual transactions across the board could theoretically have been in line with Nozick's prescription, but without a just initial distribution, we are still left with an unjust result.

Given historical circumstances, referring only to a very few examples such as the colonization of Asia, Africa and much of the Americas by Europeans, as well as the slave trade that ran for close to 400 years, we can with fair certainty conclude that even if there had been a previous stage at which all resources were distributed justly, we are far from in a situation in which we can say that today's distribution is just. Given that property, by Nozick's standards, therefore cannot be considered to be fairly distributed, how could we justify a system where rights are granted to hold claim over patents for drugs that could potentially help those people that are worst off under this unjust distribution – people who might in fact be at the worst end of the scale, specifically due to these past injustices? The patent rights acquired by some

²⁶ See pp. 113–119 in Rawls 1999, on distributive justice.

may also be a result of this past injustice, to that they are not truly entitled to them either.

The free market that Nozick holds up as the ultimate just arbitrator for transactions of holdings is not devoid of history. Neither are international agreements that affect or promote the free market. The TRIPS agreement, under the WTO, defined the playing field and *wrote the rule book*, so to speak, for how patent rights are to be interpreted for all members to the organization and signatories to the agreement. As referenced in the initial chapters, there have been made alterations and special clauses in the agreement to prevent that patent rights are allowed to run rampant and inflict grueling restrictions on access to medical care, specifically in developing nations.

But, as could be seen by the example of the South African Medicines Act, even when nations try to make use of these special clauses, because they see a dire need to do so, the initiative is shot down by other powerful actors in the field. This shows that whilst the transactions in the free market might be just and in line with Nozick's theories, the rules that are applied to the (free) market through international agreements are not in line with what is deemed *necessary* in terms of prioritization in individual nations. This is further exacerbated by the very real economical and financial *need* to be a member of the WTO and the TRIPS agreement for many nations. It is a clear cut instance of 'damned if you do, damned if you don't' politics. It is important to note that this is not necessarily problematic within the confines of Nozick's theory. It is, however, not a point in his favor that nations are by need required to partake in agreements that restrict their liberty, and dole out obligations for action that are not in line with their true interests. This seems a very real obstruction of the right to liberty.

5.1.3 Shue

As stated in chapter 4.3, Shue is a advocate for so-called *basic rights*. He believes some rights take precedence over others, regardless of which document they are in, or what is being said by state officials on which rights should be prioritized. This argument is a moral one – seeing as it puts emphasis on the element of human dignity

as something valuable that needs to be protected. But, it is also a practical argument in the distinction between different (kinds of) rights.

Some rights are basic because they are what all other rights depend upon. The *practicality* argued above lies in assuring a foundation to stand on, when doling out other rights and duties. Without certain rights at the bottom so to speak, it is ill-advised to create a further framework or list of other rights, as there needs to be a guarantee of a bare minimum available to all in order for other rights to count for anything.

Taking these points into the debate of this thesis, it becomes clear that Shue would support the prioritization of a right to health over a right to intellectual property. Without access to health care or medical treatment, it is highly likely that people will die. In fact, this is supported by daily occurrences all over the world. Once you are dead, however – and perhaps stating the obvious, you have very little need of intellectual property rights. Shue does not object to intellectual property rights, but simply states that they are not of the utmost importance.

However, Shue is not clear in how far he believes the reach of a right to health should be. As seen in chapter 4.3, Shue supports a subsistence right to ‘preventive public health care’ as a minimum. He states that not every child in need will be (automatically) entitled to open-heart surgery, but also that a ‘diet that produces a life expectancy of 35 years of fever-laden, parasite-ridden listlessness’ is not sufficient to count as proper subsistence (Shue 1996: 23). So, the justified claim to health care will have to, following Shue’s line of argument, lay somewhere in between these two extremes. It is not unreasonable to assume that access to both vaccines that prevent illness, and drugs against already contracted diseases, might constitute this ‘in between’.

Further, Shue argues that a right is the rational basis for justified claim to actual enjoyment of the right in question. A right to health would constitute the justified claim to medical treatment, even in the minimal understanding of the right as preventive health care. It is a fact that in some cases, there is no such thing as

preventive health care without drug treatment. Diseases such as tuberculosis and polio still in most regions of the world require vaccines in order to be protected against. And in the case of babies born having already contracted HIV from their mothers, would not antiretroviral (ARV) treatment count as preventive health care? There are also medications that if taken by an expecting mother prevents HIV from being transferred to the child. Does that not count as preventive health care?

A right to intellectual property would constitute the justified claim to legal protection of and access to (potential) gain from any invention patented. These two are, as seen in chapter 3.4, currently at odds with each other. Because they are at odds with each other, and because of Shue's notion of basic rights, a right to health needs to be prioritized.

5.2 The arguments confronted

I have in the previous chapters looked at which rights the three theories prescribe priority to in instances of conflict, and reached the conclusion that whilst both Rawls's and Shue's theories support the prioritization of a right to health over a right to intellectual property, Nozick's theory leans towards rather prescribing priority to a right to intellectual property. In the case of Nozick, this holds true if the right to intellectual property is defined as part property right, part right to compensation for work.

Looking then at which argument we should lend our ear to, when deciding which right should matter most, there are some considerations that need to be made.

Firstly, I will focus on the objections to prioritizing a right to intellectual property over a right to health that have been brought up earlier in this thesis. A right to intellectual property would not (necessarily) fit with a set of rights available and equal to all, cf. Rawls. Neither would it be compatible with Shue's contention that basic rights deserve preference. Shue's assertion that we need a foundation of rights in order to ensure life – health being one of these foundational rights – counts towards the prioritization thereof if one accepts this premise. Also, when looking back to the framework for justifying rights by James Nickel, presented in chapter 3.2

and 3.3, the right to intellectual property does not to the same extent measure up throughout the framework for justifying rights. Let me for a moment here consider a quote from Martha Nussbaum:

Any theory of justice that proposes political principles defining basic human entitlement ought to be able to confront [the] inequalities and the challenges they pose [...]

(Nussbaum 2004: 3–4)

This stresses, and I believe rightly so, that any theory of justice worthy of its name must be capable of answering the question of how we are to handle immense inequalities between people(s). This I interpret to mean not only being capable of answering how to confront inequalities on a theoretical level, but answering how human entitlement interests are to be ensured across the board.

Robert Nozick might be right about several of his claims, and as a moral theorist his logic is sound. It is not easy to find faults with his reasoning that any holding you have legally obtained cannot be taken away from you arbitrarily. It is also difficult to poke holes in the argument that intellectual property constitutes legally obtained holdings – especially if defined as part property, part entitlement to the fruits of one’s labor. But in order to be deemed relevant for society and as a convincing theory of justice, I believe arguments need to be applicable to real life problems and answer the concerns raised in specific situations – if these situations are reoccurring and important. The concern raised throughout these pages is that intellectual property rights prevent the supply of the right to health. This instance of concern is very much reoccurring across both time and space, as well as important – as a right to health is a right there is considerable interest in having fulfilled. Nozick’s argument for property rights is a strong one, but would employing his moral theory make us capable of ensuring these interests? If it is our interest to mitigate suffering – as an increased focus on human right over the last decades without question shows it is – is protecting property rights at all cost the way to go?

In Nozick's view, individuals have a long list of rights that limit the reach of public policy and redistribution attempts. These rights, or 'side constraints' as he labels them, entail that *no* person should have to sacrifice his or her position or belongings, to ensure the betterment of others (Malnes and Midgaard 2007: 246). It can be argued that Nozick would not be concerned with a right to health in the least. As long as people were entitled to the property they had, and they got to keep it, he would have no objections to the state of things. There would continue to be great inequalities, that would to many seem unfair.

This does not make Nozick wrong. Disagreement does not mean that one side is right and one is wrong. Neither does it mean that either side are right or wrong.

Nozick disagreeing with Shue and Rawls simply means that Nozick is not of the opinion that redistribution is something those who govern should concern themselves with. In fact, Nozick's theory constitutes an objection to the *trend of the time* – the idea that there is such a thing as a *common good* that is achievable through redistribution of property, or a *moral balancing act* (ibid.; Nozick 1974: 33). Limiting patent control or intellectual property rights would be such a moral balancing act. A failing to be in line with the popular opinion, is in and of itself not enough to deem Nozick neither irrelevant nor wrong. If his attempt is to prove that the current thinking on rights has gone too far towards the consideration of a common good, I cannot fault him for not falling in line with others.

However, if Nozick's argument is not applicable to real life – in terms of deciding if the distribution of holdings is just or not, problems arise. Nozick claims that property rights constitute *absolute constraints* against a government's intervention with individuals' property (Malnes and Midgaard 2007: 247). Yet, according to Malnes and Midgaard (2007: 247–248), this view is somewhat modified by Nozick's realization that a complete review of transactions since the dawn of time is impossible. Thus, presenting a guarantee that the current distribution is just, according to Nozick's own principles of transference, is also impossible. His emphasis on the free market as an arbitrator of conflict with regards to interest might be correct

and even morally sound. But, given that there is no just starting ground from where to start measuring if transactions are just or not, something his argument so heavily relies upon, it can perhaps not be taken as an argument convincing enough to claim that the current distribution is just, or that redistribution is not called for. In order to, perhaps, weigh up for this lack, Nozick states that:

[O]ne cannot use the analysis and theory presented [in ‘Anarchy, State and Utopia’] to condemn any particular scheme of transfer payments, unless it is clear that no considerations of rectification of injustice could apply to justify them. Although to introduce socialism as the punishment for our sins would be to go too far, past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them.

(Nozick 1974: 231)

Through this excerpt it becomes evident that whilst Nozick would strongly object to a state meddling in an individual’s private affairs and with his or her property rights on a general basis, he does open up for it in special instances where it would be in an attempt to rectify grave, past injustice. This means that in the case of intellectual property vs. health, Nozick could be said to agree with the idea that a right to health is deserving of priority – if it serves to remedy effects of past injustice, and is short-whiled.

Importantly, as the regions of the world most affected by lack of proper medical care and extreme poverty are also the regions that have been the most unjustly treated throughout history – it is not a wild assumption that these regions are, according to Nozick’s historical theory of justice, deserving of ‘special treatment’(Malnes and Midgaard 2007: 248). This special treatment could entail a more extensive state than that which Nozick would originally accept, and a scheme of *transfer payments*. This means that whilst Nozick fundamentally disagrees with Shue and Rawls, all three theories could potentially lead to the same result. A result where emphasize and priority is granted to a right to health, based on either:

- Rawls: It being a right everyone is equally entitled to.
- Shue: It being a basic right needed to ensure all other rights.
- Nozick: It being a measure required in order to make up for past injustice that has resulted in someone:
 - i) having more than they should have, by having acquired intellectual property rights they would not have had if the injustice had not happened
 - ii) having less than they should have, because past injustice had led them to not have access to health care or medical treatment they would otherwise have had.

So, whichever theory we lend our ear to, we could end up with the same result in this specific conflict of interest. Though, it is important to note here that Nozick's theory of justice would only allow for this to go on short-whiled, and until the past injustice revealed could be considered outweighed.

As all the three theories could potentially lead to the same result of giving priority to a right to health (at least for a while), there is one argument I would like to take a brief look at here – an argument that permeates throughout the debates on the conflict between these two rights.

An estimated cost for the development of a new drug or medication is upwards of \$350 million before the medicine hits market (Herper 2013); by any standard a vast amount of money. This cost is also independent on whether or not the drug ever reaches the market. What this means is that even when intellectual property rights are in place, there is no guarantee that an effort to develop a new medicine would ever pay off – either financially or in the form of a useable drug. In fact, close to 95 per cent of treatments never make it past the development stage, and much less onto the market (ibid). With this as the operational reality for pharmaceutical companies,

compounding further reasons not to develop new drugs, by removing or limiting the reach of intellectual property rights, could potentially result in a ‘quick drop and a sudden stop’²⁷ for the pharmaceutical industry’s incentives to develop new medications. Without intellectual property rights, there is a chance that incentives to develop new drugs would disappear or be diminished below a critical point. Much like in the case of the mechanic or the lawyer mentioned in chapter 4.2, if I would not be willing to pay them for their services, they would (most likely) not provide them. Drugs are produced because they are needed; and because there is money to be made from doing so. We cannot reasonably expect people to work for free. Not only does this go against our core rationality, it is also in breach of our human right to not be victims of slavery. To claim that pharmaceutical companies and their employees would be working in slavery if intellectual property rights were lowered, is hyperbole and not worthy of much consideration. Yet, the concern that the removal of intellectual property rights may result in an increase in the development of drugs that are cheap to research, manufacture and that sell well, rather than the drugs that are needed the most, is not ridiculous. Removing intellectual property rights from the equation could potentially have worse implications for global health, than having them in place has proved to have. To be able to cure diseases, we need drug development, and perhaps we need strong intellectual property rights for this to happen.

What this serves to illustrate, is that even if one were to agree with Shue and Rawls; even if one considered Nozick’s priority of property rights over equal rights or basic rights as defined by Shue and Rawls ludicrous – abandoning intellectual property rights in order to ensure a right to health, might be ‘shooting oneself in the foot’. This is why alternate schemes of remuneration for pharmaceutical companies in trade for a lowering of intellectual property rights and restrictions is such an interesting field.

²⁷ A ‘quick drop and a sudden stop’ refers specifically to death by hanging, but is here used in the sense of an end to all.

Here, no rights would be removed and the need to prioritize would disappear – instead there would be an alternate system in place to ensure that the two rights were fulfilled. As was presented in chapter 3, there are alternatives already presented, for example the Health Impact Fund of Thomas Pogge, or the WTO Remuneration Fund of Jessica Greenbaum. These alternate approaches have not (yet) been tested. There is thus no way for me to assert with confidence whether one of these systems would be better or worse than the situation today. But what is for certain is that such a scheme would be in line with all three theories. It would protect a right to health, without diminishing intellectual property rights – if the costs within this system design were put on those who had acquired more than their fair share of holdings through historical injustice.

Whilst popular opinion with regards to this question nowadays may be more in line with Rawls, and especially with Shue, through studying Nozick's arguments one cannot help but agree that there is much to be said for the protection of property rights. If not necessarily on their own, then at least as another and important weapon in the fight for the betterment of global health.

6 Concluding remarks

Jamie Crook (2005: 534) quotes Alicia Ely Yamin when he writes that '[a] broad interpretation of the right to life [should] include access to life-saving medication if withholding such treatment would otherwise deprive life'. This statement is very much in line with Henry Shue's argument for the prioritization of basic rights and his emphasize on their importance with regards to ensuring life and subsistence. At the same time, Shue's argument it is also in line with the recent currents in rights thinking, with notions such as Responsibility to Protect, Duties Beyond Borders and international courts being on the rise. There seems to be a growing appreciation for and adherence to human rights, and human rights being understood in a different way from that of traditional, liberal rights. Not only within single nations can this increase in emphasize be seen, but also through international undertakings to ensure human rights worldwide. This could come from a spark in agreement on the idea that we are all equal, all in *possession* of human dignity, and deserving of equal rights. This again is very much consistent with Rawl's theory of justice and equal rights.

I have in the past chapters reached some conclusions as to what the three theories suggest we give preference to, in the debate of what matters most. I have found that Henry Shue and John Rawls lean in the direction of a human right to health being worthy of precedence, whilst Robert Nozick's framework supports the upholding of a right to intellectual property. Nozick does, however, open up for redistribution attempts, if they are made use of in order to rectify past injustice and are short-whiled. Further, I have concluded that whilst proving either of the theories analyzed wrong was not something I was able to do, they all under certain conditions pull in the direction of the human right to health being of higher priority than the right to intellectual property.

Further, the right to intellectual property is tied to the right to health in more ways than one. It is not solely a hinder to the efforts regarding the betterment of global health. Intellectual property rights are also perhaps dearly needed, in order to ensure further research and development of medications and medical technology. This leads me to the conclusion that whilst the normative approaches to the question of priority analyzed in

this thesis points towards a right to health, it might not be fruitful without also ensuring a right to intellectual property. What is of the utmost importance is how we execute this right, so that it does not work against a right to health – but rather supports it and increases its reach. When a right to intellectual property is deemed necessary, as I believe it is, we need concern ourselves with how to ensure and enforce it, without jeopardizing other rights. The question should not necessarily be if intellectual property rights are legitimate as they compromise efforts to ensure global health. Rather the conversation should concern itself with how to continue financing of research and development, without having those in the most dire need, and those who have the least due to past injustices, be responsible for footing the bill. The Health Impact Fund and the World Trade Organization Remuneration Fund are optional design schemes that might alleviate the conflict of interest between holders of intellectual property rights and those in need of medical care.

The Universal Declaration of Human Rights consists of articles setting out to ensure the bare minimum of right we should be satisfied with, in order to ensure human dignity. The right to life's central placement suggests great importance, a notion that finds support worldwide. Without ensuring a right to life, I believe there is a logical dissonance in debating which other rights to ensure, or how to prioritize between different rights. A right to health care and medical treatment will go a long way in furthering the right to life. Perhaps would a right to intellectual property do the same, if it was understood, enforced and ensured in the right way? The right way would be one that ensured a just system of rights for all – both those in need of medical care, and those deserving of intellectual property rights. Ultimately, that is what matters most.

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