

## Chapter 9: Objections

(Version 3.1, September 2016)

In the previous chapter, we examined four families of arguments that might justify increasing the extent to which the residents of developed countries pay for initiatives that would help alleviate the health crisis in developing countries. Arguments from national self-interest, we concluded, provide weak support for reforms of the sort we are considering. Arguments that seek to rectify the injustice that characterized past relations between developed and developing countries provide more substantial support, but also have serious weaknesses. Utilitarianism, by contrast, tilts quite strongly in favor of our recommendations. Finally, some nonutilitarian theories of distributive justice point toward various minor respects in which our plan might be adjusted, but also lend strong support for our overall program.

We now turn our attention to three general objections to the composite argument we have developed thus far. The first asserts that the ethical obligations with respect to healthcare that we have argued can be derived from either utilitarianism or nonutilitarian theories of distributive justice do not extend beyond national boundaries. The second contends that tampering with the patent system (as applied to pharmaceutical products) would be both counterproductive and illegitimate. The third warns us against interference in the private healthcare market.

### A. The Limits of Ethical Commitments

Recall that, at the conclusion of our discussion of utilitarianism, we acknowledged that the normative implications we derived from that outlook were vulnerable to three serious criticisms: (1) they are too ethically demanding; (2) they exceed what is required internationally by liberal justice; and (3) they are ethically incorrect in light of, or incompatible with, our more sure-footed, particular commitments. Variants of the same three objections are also deployed by those who oppose internationalizing the considerations of justice that we have shown grow out of nonutilitarian theories of distributive justice.<sup>1</sup> In particular, the second objection stands as a barrier to attempts to extend Rawlsian egalitarian and rights theories to the international arena, the third objection impedes efforts to apply internationally the communitarian variant of the teleological argument, and the first objection opposes universalizing the argument from human flourishing based on essential capabilities. For the non-Rawlsian theories of liberal equality or rights, there should be, *prima facie*, little difficulty in extending their considerations beyond national borders (given their bases in universalist ethics); however, versions of the second and third objections may still be invoked to limit their scope.

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<sup>1</sup> The articulation of internationalist or cosmopolitan values in the policy of Western nation-states is sometimes denounced on two other grounds, which we can dispense with quickly. First, it is sometimes said that recognizing international claims of justice (such as those based in human rights) opens the door to repeated violations of the sovereignty of weaker nations. Some critics contend that interventions in other states' affairs, no matter how well meant, are inherently deplorable; others think that ostensibly benign motives will all too often be mere covers for more selfish agendas. Neither ground for resistance applies here, as none of our reforms entails any violation of sovereignty. Second, it is sometimes argued that pursuit of cosmopolitan aims is ill-advised or inefficacious, because all too often the institutions charged with implementing the relevant policies lack sufficient local knowledge and sensitivities. Most of the reforms we contemplate will be free from this concern, and administration of the few variations that might entail it will simply have to attend carefully to this worry.

These obstacles are formidable, but the three arguments set forth below are capable, in our view, of overcoming them.

### 1. Obligations to the Needy

Each of us has a duty to assist those in dire need, regardless of the cause of that need. This obligation may be seen as a component of what justice requires (in addition to, say, fairness, reciprocity, or fit), rooted in a positive moral duty to prevent severe harm or to alleviate severe suffering that is within one's sphere of influence; or it can be seen as stemming from an independent ethical obligation of beneficence.

A prominent version of this argument, explicitly oriented toward global issues, has been developed by Peter Singer,<sup>2</sup> and has been applied by Mpho Selemogo to the AIDS crisis in Africa.<sup>3</sup> Singer argues that acceptance of two plausible principles justifies transfer of resources from the affluent to the impoverished: (1) suffering and death from lack of food, shelter, and medical care are bad; and (2) if we can prevent something bad without sacrificing something of comparable moral significance then we should do it. We should refrain from extending aid only if (a) doing so would cause something else comparably bad; (b) the nature of our act would constitute a wrong in itself; or (c) we would thereby fail to promote some other good, comparable in significance to the bad thing we can prevent.

This argument, if persuasive, generates a powerful response to isolationism with regard to healthcare. As we have seen, millions of people are suffering and dying from contagious diseases in developing countries. Moreover, the residents of developed countries could alleviate much of that suffering with relative ease. Singer contends that inaction under such circumstances can be justified only on three grounds. The second of those grounds – specifically, the contention that adoption of the reforms we propose would violate property rights – we will consider in Section C, below.<sup>4</sup> Putting that possibility to one side for the time being, Singer's framework would seem to leave us only two excuses for inaction – that action would result in an equally serious negative side effect, or that we would disable ourselves from achieving some comparably important moral good. Assessment of those possibilities requires a brief review of the costs and benefits of our proposals.

Let's first define the baseline. The global pharmaceutical R & D bill currently comes to roughly \$150 billion per year. That bill is paid almost entirely by the one billion people living in developed countries.<sup>5</sup> The mean per capita income in those countries is \$32,683. Each person's share of the R & D bill is thus, on average, \$150 – 0.5% of his or her income.<sup>6</sup>

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<sup>2</sup> Peter Singer, *Famine, Affluence, and Morality*, 1 *Phil. & Pub. Aff.* 229, 231 (1972). Singer's argument is not dependent on his somewhat notorious brand of utilitarian consequentialism; analogous arguments, applied similarly to the global setting, have been developed within a duty-based or deontic framework. See generally Onora Nell, *Lifeboat Earth*, 4 *Phil. & Pub. Aff.* 273 (1975).

<sup>3</sup> Mpho Selemogo, *The African AIDS Crisis and International Indifference*, 66 *Humanist* 24 (2006).

<sup>4</sup> See John Arthur, *Rights and Duty to Bring Aid*, in *World Hunger and Morality* 39 (William Aiken & Hugh Lafollette eds., 1996).

<sup>5</sup> Half of the bill is paid by residents of the United States. See *supra* note \_\_\_\_.

<sup>6</sup> All income and population figures pertain to the year 2004 and are drawn from World Bank, *World Development Indicators 2006*, *supra* note 48, at tbl.2. (We use currency-exchange-rate dollars, not PPP dollars, because the analysis is based on R&D figures in U.S. dollars unadjusted for PPP differentials.) We are simplifying

As we have seen, the vast majority (roughly 97.5%) of the research supported by this budget goes to develop drugs aimed at diseases that are common in developed countries.<sup>7</sup> In other words, almost all of the money spent by residents of prosperous countries on drug research helps themselves.

We pause to consider an important subsidiary issue: As noted above, the residents of developing countries currently pay only a tiny portion of the global R&D bill. In part this is because their governments lack the money to support expensive publicly funded research ventures. In part it is because they purchase relatively few drugs at market prices. But they do reap some benefit from the research. As we saw in Chapter 4, a growing (albeit still small) number of patented drugs are made available at low prices in developing countries, either voluntarily by their manufacturers or through compulsory licensing systems. And patent protection for all drugs eventually ceases, at which point inexpensive generic versions of them can and typically are distributed in developing countries. In reaping these benefits without paying for them, are the residents of developing countries behaving badly? In our judgment, no. As indicated above, most of the diseases targeted by current pharmaceutical research occur in both developed and developing countries. The benefit the research provides to the residents of the developing world is thus most plausibly characterized as a positive externality – analogous to the benefit reaped by the neighbors of a landowner who installs for his own enjoyment a lovely sculpture on his front lawn. Ordinarily, one would not think that the neighbors are behaving immorally when they gaze at the sculpture. Similarly, it would be difficult to argue that the residents of developing countries are behaving immorally when they consume drugs for whose development they have paid little or nothing, when those drugs would have been developed anyway. Not impossible, perhaps. Conceivably, their "free-riding" might be characterized as unethical, and we should be looking for legal reforms that would stop it. But such an argument seems sufficiently far-fetched that we will not pursue it, and will focus instead on the issue raised by the reforms we ourselves have proposed, which would require the residents of developed countries to pay for research from which they receive little or no benefit but that saves lives and alleviates suffering in the developed world.

As we have seen, the benefit/cost ratio associated with at least the initial versions of our proposals would be very large. A modest sum devoted to an optional prize system focused (in practice) on stimulating the development of vaccines and drugs for neglected diseases and a similarly modest sum in the form of an indirect tax arising from a floor-and-trade regulatory system would likely save many lives in the developing world. Huge gains for a small price. Surely, we have a duty, on Singer's premises, to act.

But does this launch us down a moral "slippery slope"? If we accept arguments of this general sort, can we ever draw a line and let residents of the developed world enjoy their lives (and affluence) with some peace of mind?<sup>8</sup> Objections of this sort are often advanced against arguments like Singer's, but we suggest that they have little weight in the situation before us. Although Singer himself often focuses heavily on the moral duties of individuals to give to

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for present purposes by assuming, contrary to fact, that the drug R&D bill is proportionately divided among the developed countries.

<sup>7</sup> See Chapter 4, Section A.

<sup>8</sup> Cf. Fried, *Right and Wrong*, supra note 89, at 13 ("[C]onsequentialist systems like utilitarianism ... are oppressive in the totality of the claim they make on moral agents.").

charities, our own approach is much less taxing on individuals' consciences, as we are interested in reforming governments' health innovation policies (something that also, likely, will be much more effective than individual level donations). Further, the situation we are addressing involves especially (perhaps uniquely) strong reasons for intervention: at stake is a fundamental human interest (basic health needs); the pain it would avoid is enormous; and burdens that "we" would have to bear are modest.

The argument deployed above seems sufficient to meet the objection, which can be made from several of the philosophical perspectives we have surveyed, that the reforms we advocate are too ethically demanding. The argument can be incorporated especially easily within liberal theories of distributive justice, most proponents of which already explicitly acknowledge a "duty to aid" across national boundaries, at least when the disproportion between benefits and costs is large.<sup>9</sup> Even communitarians should find the argument telling for two reasons. First, the communitarian proposition that one's given particular identities are one's moral starting points does not mean that they are necessarily one's ending points. As Michael Sandel has argued, communitarians can recognize obligations extending beyond national borders, even if they are less strong than those raised by one's fellow nationals.<sup>10</sup> The situation before us would seem to present a paradigm case of such an ancillary obligation. Second, recognizing an obligation to assist the desperately ill in developing countries seems congruent with the method of ethical deliberation advocated by many communitarians: ascertaining, and then selecting from, developing and affirming, the values inhering in a culture's institutions, practices, and norms, interpreted in a manner that best fits the culture as a whole and renders it most "excellent" or worthy of honoring.<sup>11</sup> The outpouring of concern and assistance witnessed during the Asian tsunami disaster of 2004-2005 and the Japanese

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<sup>9</sup> See, e.g., Rawls, *Law of Peoples*, supra note 90, at 106 (recognizing existence of duty on part of "well-ordered" peoples to assist "burdened" societies); Miller, supra note 90, at 171, 179 (arguing that while "comparative principles of justice operate only within national boundaries," nevertheless "noncomparative principles may operate across them," and that there is "general obligation to support and aid other human beings regardless of political or cultural boundaries"); Anderson, supra note 127, at 321 n.78 (developing social-relational account of liberal equality that nevertheless recognizes "global humanitarian obligations to everyone, considered simply as human beings--to relieve famine and disease, avoid fomenting or facilitating aggressive warfare, and the like"); Blake, supra note 90, at 259, 294 (arguing that while liberal commitments to moral equality and individual autonomy do not require extending concern with distributive justice or "relative deprivation" beyond the domestic arena, they nevertheless do require "concern with absolute deprivation in the international arena," so as to ensure that no one falls below a "threshold [of] decent human functioning" such that would jeopardize his autonomy, concern that would "mandate a surprising degree of international reorganization and reform, given the current degree of economic destitution in the world").

<sup>10</sup> Sandel, *Democracy's Discontent*, supra note 91, at 343 ("To affirm as morally relevant the particular communities that locate us in the world, from neighborhoods to nations, is not to claim that we owe nothing to persons as persons, as fellow human beings .... The cosmopolitan ethic is wrong, not for asserting that we have certain obligations to humanity as a whole but rather for insisting that the more universal communities that we inhabit must always take precedence over more particular ones.").

<sup>11</sup> For general accounts of the method, see Walzer, *Spheres of Justice*, supra note 137, at 3-10; Walzer, "Spheres of Justice": An Exchange, supra note 137; MacIntyre, supra note 39, at 186-203, 220-25. For a specific discussion coming to a conclusion similar to ours, see Sandel, *Democracy's Discontent*, supra note 91, at 385 ("At their best, local solidarities gesture beyond themselves toward broader horizons of moral concern, including the horizon of our common humanity.").

earthquake and tsunami of 2011<sup>12</sup> are only the latest demonstrations that people in developed countries recognize the pull of such a call to assist.<sup>13</sup>

## 2. International Distributive Justice

Do general principles of distributive justice apply among nations? Rawls, influentially, says no. Upon a properly conceived political conception of liberalism, he argues, considerations of distributive justice only arise in the context of a scheme of social cooperation that involves reciprocal benefits and burdens or mutual coercion, and no such scheme currently exists at the international level. At present, consequently, nations only owe to each other three modest duties: (1) to abide by international law and custom (primarily, principles of non-aggression and self-defense and obligations under conventions, treaties, and other agreements), (2) to fulfill some modest additional duties of mutual aid and of assistance to "burdened states," and, (3) possibly to intervene in the internal affairs of non-"decent" peoples to protect human rights.<sup>14</sup>

Two theorists, Charles Beitz and Thomas Pogge, have developed what we find to be compelling responses to Rawls's stance.<sup>15</sup> Because of the force and prestige of Rawls's argument, we feel obliged to spell out Beitz's and Pogge's positions in some detail, indicating along the way the implications of their positions for the problem before us.

Beitz advances two claims within a Rawlsian contractarian framework and a third that, while perhaps not strictly within the contractarian framework, nevertheless draws on

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<sup>12</sup> See, for example, "Japan Disaster Relief: Where to Give," March 12, 2011, <http://abcnews.go.com/International/japan-earthquake-donating-relief-funds/story?id=13122660#.T0qa11HZq-I>.

<sup>13</sup> This argument will dissatisfy some readers on one of two related grounds. First, it roots the case for helping to alleviate the health crisis in the developing world in a duty of assistance, one of "charity" rather than "justice," or, if of justice, then of an altruistic conception of it. Second, it encases the sentiment of benevolence within the language of "duty," conjuring images of self-abnegating altruism that some argue is an unpleasant feature of much modern, post-Kantian, moral philosophy. See, e.g., Williams, *Ethics and the Limits of Philosophy*, supra note 82, at 174-96. We are untroubled, because we see benevolence as the expression of an expanded sense of self, as part of an ethical vision in which mutual concern and fellow-feeling have a prominent place. But those readers who are will, we hope, find the arguments of subsections (2) and (3) below more congenial.

<sup>14</sup> See Rawls, *The Law of Peoples*, supra note 90, at 37, 93-94 n.6; Blake, supra note 90, at 257-58, 265-73, 280-85; David Reidy, *Rawls on International Justice: A Defense*, 32 *Pol. Theory* 291, 291-92 (2004); Risse, supra note 31, at 94-108. Political-liberal opposition to strong claims for global distributive justice can be framed in two different forms. The first argues that the grounds for applying considerations of distributive justice to social and economic arrangements simply do not extend from the domestic to international settings, because the factors that operate to trigger distributive justice claims (social cooperation or mutual coercion) are not present in the latter case. This is the argument we take up in this section. The second recognizes that there are grounds for claims of international or global distributive justice, but that these are sharply delimited by the greater weight to be given domestic claims rooted in, inter alia, reciprocal obligations and coercion. We take this argument up in the following section.

<sup>15</sup> See generally Charles Beitz, *Justice and International Relations*, 4 *Phil. & Pub. Aff.* 360 (1975) [hereinafter Beitz, *Justice and International Relations*]; Charles R. Beitz, *Political Theory and International Relations* 198- 214 (1999) [hereinafter Beitz, *Political Theory*]; Charles Beitz, *Rawls's Law of Peoples*, 110 *Ethics* 669 (2000) [hereinafter Beitz, *Rawls's Law of Peoples*]; Thomas Pogge, *Realizing Rawls* (1989); Thomas Pogge, *An Egalitarian Law of Peoples*, 23 *Phil. & Pub. Aff.* 195 (1994); Thomas Pogge, supra note 156.

considerations relevant to a Rawlsian approach.<sup>16</sup> First, at an absolute minimum, any theory of a just international order of nation-states must take into account the arbitrariness of a division of the world's resources according to the contingences of territorial sovereignty.<sup>17</sup> Because no state party to an original position for negotiating the rules of international political order would agree to let natural resources lie where they fall, there must be some principle of equitable distribution of such resources, even if we otherwise assume monadic national self-sufficiency.<sup>18</sup> This argument parallels one of the reasons why Rawls and other liberals accept

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<sup>16</sup> The claims are not all developed within a single argument. The first two are advanced in Beitz, *Justice and International Relations*, supra note 177; the third is most clearly articulated in Beitz, *Rawls's Law of Peoples*, supra note 177. Note, Beitz himself does not make any sharp distinction between the second and third arguments, but we think they are distinguishable. Some support for our reading is found in Beitz's remark that the following three elements, which roughly track the three different arguments, are "independently significant" factors that lie somewhat beyond a country's autonomous control but which nevertheless affect its welfare and hence pose the issue of international or global distributive justice: "resource endowments," "degree of reliance on international trade," and "patterns of international investment." *Id.* at 693 n.34. In general, there are parallels between these three arguments and the following three reasons that, as we suggest in other parts of this paper, Rawls can be seen to advance in favor of taking domestic socioeconomic arrangements as a proper subject for liberal justice: (1) the argument against the normative persuasiveness of the justifications advanced for the ostensibly minimalist or natural entitlements the enforcement of which libertarians argue state action relating to justice should be limited to, see *infra* note 256 and accompanying text; (2) the legal realist argument of the pervasiveness of continued state action in the so-called "private" sphere beyond the enforcement of minimalist entitlements, see *infra* notes 255-57 and accompanying text; and (3) the argument from social theory, registering the omnipresent shaping effect of the structures of the social world on individuals' life chances, see *supra* notes 88 and 96 and accompanying text.

<sup>17</sup> Beitz, *Justice and International Relations*, supra note 177, at 367- 68. Beitz also points out that neither of two considerations apply here that arguably work to curb the force of arbitrariness in the context of allotments of genetically based talents: (1) the *prima facie* "it's mine" argument from the inextricable entanglement of talents with one's physical self (and the self-dominion that has powerful force as an ethical primitive); and (2) the argument from personal identity along the lines that freely choosing how to develop one's talents is part of how one shapes one's personhood. *Id.* at 368-69. It may be objected that Beitz's argument is premised on a more positive, or at least straightforward, correlation between resource distribution and socio-economic development than can be sustained in light of the literature on the "resource curse." One response is that while a strong domestic resource base may not always be necessary, sufficient, or even positive for development, there is little doubt that it can be very beneficial (e.g., United States, Canada), and, in any case, access to foreign resources on favorable terms seems close to indispensable (e.g., England, Japan). Further, Pogge argues that the significance of resources to the global economy is drastically understated by a reliance on the share of aggregate global GDP or international trade volume taken by resource sales when these are measured by their current market prices, since these reflect "a negative externality that the corrupt elites of resource-rich developing countries and the heavy consumers of resources together manage to impose upon the populations of those developing countries as well as on future generations, for whom such resources will be considerably less plentiful and more expensive." Pogge, *World Poverty*, supra note 157, at 247 n.264. Finally, if "resources" are understood not narrowly as raw material inputs but more broadly as favorable geographic circumstances, then the case of their importance is strengthened. See Sachs, supra note 30; Diamond, supra note 20. Extending Beitz's argument by so broadening the interpretation of "resources" should be acceptable as long as knowledge of the relation between geographic circumstances to development can be imputed to participants in the original position, which seems not unreasonable on Rawlsian stipulations regarding what real world knowledge participants can draw upon behind the veil of ignorance.

<sup>18</sup> What exactly this principle should require is, Beitz acknowledges, somewhat unclear, although something along the following lines may be right: distribution of resources in proportion to each nation's population, adjusted by taking into account differences of effort undertaken in extracting resources, and, ideally, some recognition of the variation in the needs of communities with different cultures, economies, and geographies. In any event, Beitz states that the "underlying principle is that each person has an equal *prima facie* claim to a share of the total available resources," with departures from this standard needing to be justified, "analogously to the operation of

the need to evaluate the outcomes generated by "the basic structure" of background socio-economic conditions: a rejection of the persuasiveness of justifications advanced by libertarians for their set of minimalist "natural" entitlements.

Beitz's second argument parallels another reason why liberalism takes seriously the basic structure in domestic settings, namely, that there exists a scheme of interchange between nations that is shaped and backed by coercive rules, rules going well beyond the enforcement of minimalist entitlements. In this vein, Beitz challenges the assumption of national self-sufficiency that was accepted *arguendo* under his first argument. This assumption, argues Beitz, is false at the very least in the weak sense that there is already enough international interdependence that the parties (states) have to some extent taken on burdens of compliance with international institutions and rules of interchange, burdens that require justification by principles of fairness for the scheme.<sup>19</sup> The primary examples of such international rules and institutions would be those regulating global and regional trade and investment (World Trade Organization ("WTO") and bi- and multilateral trade and investment agreements) and finance (the World Bank and the International Monetary Fund).<sup>20</sup> The existence of such a scheme is relevant, Beitz claims, even if a wealthy country could be self-sufficient "in the sense that its income from trade is marginal compared with total national income," as long as it "still participates in economic relations with less developed countries which impose great burdens on the latter."<sup>21</sup> Beitz, however, argues for an even stronger position: that the degree of international political and economic interdependence is in fact quite a bit higher than marginal, involving "a pattern of relationships which are largely nonvoluntary from the point of view of the worse-off participants."<sup>22</sup> The result is that by now there exists a global cooperative scheme where, at minimum, "some societies are able to increase their level of well-being via global trade and investment while others with whom they have economic relations continue to exist at low levels of development."<sup>23</sup>

Beitz concludes that these considerations justify either of two positions.<sup>24</sup> The "weak thesis" is that relations among nations, because of their resemblance to the basic structure of

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the difference principle" (i.e., socioeconomic inequalities must be to the greatest benefit of the least-advantaged group). Beitz, *Justice and International Relations*, *supra* note 177, at 370-71.

<sup>19</sup> Drawing on arguments of the sort summarized in Chapter 10, Section B, Beitz asserts that "the system of interdependence imposes burdens on poor and economically weak countries that they cannot practically avoid." Beitz, *Justice and International Relations*, *supra* note 177, at 374.

<sup>20</sup> Milanovic, *Worlds Apart*, *supra* note 26, at 149-50 (referring to this state of affairs as "plutocracy" and remarking that "[i]t has become almost commonplace to point out that the rules of the game in all important international organizations are disproportionately influenced by the rich world, and among them by specific interest groups"). For analysis of the interests, ideologies, operations, and impacts of the World Bank and International Monetary Fund ("IMF"), see generally Joseph Stiglitz, *Globalization and Its Discontents* (2002); Jagdish Bhagwati, *In Defense of Globalization* 199-207 (2004). For an analysis of the different ways in which the overall "international framework" has been tilted in its effects in favor of the United States and its G-7 partners, see generally Robert Wade, *The Invisible Hand of the American Empire*, 17 *Ethics & Int'l. Aff.* 77 (2003).

<sup>21</sup> Beitz, *Justice and International Relations*, *supra* note 177, at 375 n.17.

<sup>22</sup> *Id.* at 374.

<sup>23</sup> *Id.* at 375. Beitz suggests that an even stronger view is perhaps "more plausible," which is that "poor countries' economic relations with the rich have actually worsened economic conditions among the poor." *Id.* at 375 n.18.

<sup>24</sup> Beitz himself suggests that the foregoing considerations justify going even further than these two positions--all the way to a strong cosmopolitanism, in which national boundaries are not taken "as having fundamental moral

domestic society, are subject to some requirement of distributive justice. The "strong thesis" is that the applicable requirement regulating this interchange should be Rawls's difference principle.<sup>25</sup> The implication of this claim for our purposes is that, until the rules and institutions structuring interchange between nations, such as those relating to terms of trade, labor and capital mobility, currency bailouts, and debt financing, are subject to scrutiny by some defensible norms of distributive justice, the sorts of reforms that we are suggesting for the sake of international justice in health are justifiable interim measures. This argument should prove persuasive not only to political liberals, but also to communitarians, since the relevant subject here is the justness of relations between nations, not between people across national borders.<sup>26</sup>

Finally, Beitz advances a third consideration, one that suggests an even more thorough-going supra-national application of principles of distributive justice. The preceding argument centered on the existence of specific institutions at the international level that regulate certain aspects of economic interchange between nations. However, as Beitz suggests, given the following circumstances it may not be possible to distinguish intelligibly between the domestic and international influences on the economies of "contemporary developing societies which are enmeshed in a global division of labor":

[A] society's integration into the world economy, reflected in its trade relations, dependence on foreign capital markets, and vulnerability to the policies of international financial institutions, can have deep and lasting consequences for the domestic economic and political structure.<sup>27</sup>

More generally, an excessive focus on a few salient international institutions risks obscuring a set of wider and deeper "background" political and economic interactions and relations that take place not only between but also across nations.<sup>28</sup> The most relevant of these interactions are those anchored in the production and finance investment decisions of multinational (and increasingly transnational) firms (commonly originating from one or another developed country), working in conjunction with political and economic elites in developing countries within a framework of rules, policies, and relationships that, while increasingly cross-national, also remain heavily structured by the distribution of geopolitical power among nations and economic power among regions. While such supra- and infra-national relations are hardly novel (as indicated by the historical literature reviewed in Chapter

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significance," and instead principles of distributive justice are applied without respect to citizenship or residency "to the world as a whole." *Id.* at 376. This conclusion, it seems to us, can be supported more effectively by the third claim that Beitz advances, which we discuss next.

<sup>25</sup> Beitz, *Afterword to Political Theory and International Relations*, *supra* note 177, at 185, 198-99.

<sup>26</sup> Bolstering this argument would be the claim advanced in Chapter 10, Part B, for corrective justice in light of the history that has transpired between national communities from the developed and developing world. That argument should have especial weight for communitarians, in light of their explicit embrace of the ethical significance of an inherited history that comes with a situated self's particular social location (its "debts, inheritances, rightful expectations and obligations"). See MacIntyre, *supra* note 39, at 220.

<sup>27</sup> Beitz, *Rawls's Law of Peoples*, *supra* note 177, at 690.

<sup>28</sup> Cf. Robert Wade, *Choking the South: World Finance and Underdevelopment*, 38 *New Left Rev.* 115, 115 (2006) (observing, and correcting for, fact that too often focus "on the role of the international institutions--IMF, WTO, World Bank" has come at expense of attention to equally, if not more, significant factor in developing countries' prospects: "the world financial system itself").



8), many observers suggest that they now penetrate more deeply than ever into domestic societies, and are accompanied by a qualitatively new level of transnational outlook among elite business and political decision-makers. Studying these arrangements and developments is the province of the nascent fields of international political economy and global sociology.<sup>29</sup> Studies in those fields stress the need to take seriously the existence of cross-national social structures that, just as in the domestic setting, heavily shape individual life chances but that may be only indirectly the result of government power.<sup>30</sup> If Rawls's earlier recognition of a "social world" that shapes citizens' life chances was an important advance for liberal-individualist political philosophy (incorporating for purposes of domestic justice the existence of a social structure elaborated by social theorists), it now seems necessary to register the existence of a global "basic structure" of background social and economic arrangements. Otherwise, political philosophy risks lapsing into what Brian Barry called, in the domestic context, "social-scientific illiteracy."<sup>31</sup>

Pogge develops similar arguments,<sup>32</sup> but then goes substantially further. The basis for his non-Rawlsian theory is the duty of governments and people to refrain from doing harm – in particular, to refrain from violating people's basic human rights. As we saw in the preceding chapter, Pogge claims that all people have rights to minimum levels of basic goods, including subsistence material goods and healthcare, that are essential to a decent life, and therefore all "coercive social institutions" must be so arranged as not to jeopardize secure access to such goods. Pogge argues that there are two major ways in which the current institutional arrangements and policies of the international political-economic system (and, derivatively, developed country governments and citizens) do cause harm to developing country populations that amounts to violations of their human rights.

First, Pogge argues that the "global economic order" instituted by the 1995 establishment of the WTO has been "causally implicated in the reproduction of massive poverty."<sup>33</sup> This admittedly controversial claim rests on the followings assertions. First, several of the provisions of the General Agreements on Tariffs and Trade ("GATT") successfully sought by developed-country governments, such as protectionist measures relating to agriculture, textile, and clothing, have been particularly disadvantageous and

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<sup>29</sup> For international political economy, the pioneer has been Susan Strange. See generally Susan Strange, *The Global Political Economy, 1959-1984*, 39 *Int'l. J.* 267 (1984); Susan Strange, *States and Markets: An Introduction to International Political Economy* (1988); John M. Stopford & Susan Strange, *Rival States, Rival Firms: Competition for World Market Shares* (1991); Susan Strange, *Political Economy and International Relations*, in *International Relations Theory Today* 154 (Ken Booth & Steve Smith eds., 1995); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996). For key works of global sociology in this vein, see William I. Robinson, *A Theory of Global Capitalism* (2004); Saskia Sassen, *The Global City: New York, London, Tokyo* (2001); Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (1996).

<sup>30</sup> Cf. Anderson, *supra* note 127, at 321 n.78 ("As the economy becomes global, we are all implicated in an international division of labor subject to assessment from an egalitarian point of view. We have obligations not only to the citizens of our country but to our fellow workers, who are now found in virtually every part of the globe.").

<sup>31</sup> Barry, *supra* note 96, at 214; see also Kieran Healy, *The Contribution of Sociology*, in *Contemporary Political Philosophy* (Robert E. Goodin, Philip Pettit & Thomas Pogge eds.) (forthcoming 2007) (manuscript at 13-26, on file with the authors).

<sup>32</sup> For Pogge's Rawlsian arguments, see *Realizing Rawls*, *supra* note 177, at 240-80, and *An Egalitarian Law of Peoples*, *supra* note 177.

<sup>33</sup> Thomas Pogge, *Symposium: World Poverty and Human Rights*, 19 *Ethics & Int'l. Aff.* 1, 4, 5 (2005).

burdensome for developing countries, with their combined effects resulting in the impoverishment and deaths of millions.<sup>34</sup> Second, these effects were foreseeable and hence responsibility is assignable to the governments that used their "crushing advantage in bargaining power and expertise" to press for maximally advantageous, rather than fair, terms.<sup>35</sup> Finally, it would be no defense to argue (even if it were true) that were it not for the Uruguay Round agreements, there would have been even more poverty and poverty-related deaths in the developing world. While these considerations are relevant to assessing the choices faced by the developing country signatories, they do not bear on evaluating the decisions made by the developed countries; the latter bear responsibility for whatever suffering and deaths were caused by the imposition of terms more onerous than would have been just and politically feasible.<sup>36</sup> Finally, the citizens of developed countries, Pogge insists, bear a significant measure of responsibility "for the global institutional arrangements their governments have negotiated in their names."<sup>37</sup>

Pogge's second argument takes up a likely objection to a heavy emphasis on international factors in explaining developing-world poverty: Such an account overlooks "the incompetence, corruption, and tyranny entrenched in the governments, social institutions, and cultures of many developing countries."<sup>38</sup> In reply, Pogge acknowledges that such local factors are causally significant, but insists that they are not so easily delinked from the international system and that, in particular, authoritarian regimes are often encouraged or at least sustained by two key ways that international agencies, Western governments, and other foreign institutional actors cooperate with them: by recognizing the authority of such regimes both to sell the country's natural resources and to borrow funds (against, of course, future promises to repay).<sup>39</sup> These two "international privileges" not only fail to discourage but actively encourage coups and authoritarian regimes by rewarding "any group controlling a preponderance of the means of coercion within a country" with international legitimacy, "regardless of how this group came to power, how it exercises power, and the extent to which it may be supported or opposed by the population it rules."<sup>40</sup>

The overall thrust of Pogge's position is to challenge two linked assumptions that he thinks are widespread and help rationalize inaction by residents of the developed world in the face of massive global poverty: that the severe poverty facing roughly three billion people in

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<sup>34</sup> Pogge, *World Poverty*, supra note 156, at 18. Pogge's main support for this claim is that the estimated magnitude of the effect of such protectionist measures is \$700 billion in lost export sales for developing countries, amounting to 11% of the developing world's total annual GNI, a gargantuan amount against the backdrop of "hundreds of millions undernourished and barely surviving." *Id.*

<sup>35</sup> *Id.* at 20.

<sup>36</sup> *Id.* at 17-19.

<sup>37</sup> Pogge, supra note 198, at 5.

<sup>38</sup> Pogge, *World Poverty*, supra note 156, at 21.

<sup>39</sup> *Id.* at 22, 112-16.

<sup>40</sup> *Id.* at 22, 112. Pogge also mentions in passing the role played by "our governments" in "instigat[ing] the violent installation of many oppressive rules in the developing world" and in selling "juntas and autocrats the weapons they need to stay in power." Others might give this consideration more weight, given the historical literature reviewed in Chapter 10, and the oft-noted tensions that recur in American foreign policy between the pursuit of geopolitical and material interests through pliant regimes and efforts to promote democracies. Compare *Exporting Democracy: The United States and Latin America* (Abraham Lowenthal ed., 1991), with William I. Robinson, *Promoting Polyarchy: Globalization, U.S. Intervention and Hegemony* (1996).

the developing world is "due exclusively to local causes"; and that the one billion residents of the affluent countries are morally entitled to eighty percent of the global product in the face of such poverty elsewhere.<sup>41</sup> One of his chief aims is to shift thinking in this area away from notions of positive aid or charity ("we must stop thinking about world poverty in terms of helping the poor") and toward conceptions of avoiding harm and doing justice (the poor "need help only because of the terrible injustices they are being subjected to.") For residents of developed countries, the key task is to stop "the imposition, by our governments in our name, of a coercive global order that perpetuates severe poverty for many who cannot resist this imposition."<sup>42</sup>

Pogge makes two sweeping proposals designed to alleviate the injustice he identifies: reducing "the expected reward of coups d'etat" through reforms that will curb the two "international privileges" of illegitimate resource sales and loans;<sup>43</sup> and a "global resources dividend" whereby "the global poor own an inalienable stake in all limited natural resources," a stake that confers no decisional power but does entitle its holders to a small share of the economic value of whatever use the resource is put, with proceeds "to be used toward ensuring that all human beings can meet their own basic needs with dignity."<sup>44</sup> To justify the reforms we advocate, one need not go nearly so far. Sufficient for our purposes are two more modest propositions that follow directly from Pogge's diagnosis: First, international institutions, such as the WTO – and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") in particular – must be reformed so as to eliminate their complicity in unjustifiable harms to the residents of developing countries. (A few such reforms are outlined in Chapter 6.) Second, Northerners' obligation to help alleviate the health crisis in the South derives strength, not merely from a general duty to help others in need, but also from a duty to address injustices arising from a global system of interdependence for which the Northerners are to a large extent responsible.

The empirical assertions underlying Beitz's three arguments – that the distribution of natural resources among jurisdictions is arbitrary; that both the relations among nations and the welfare of the residents of each nation are powerfully affected by treaties and institutions in shaping which developed countries had the upper hand; and that cross-national socioeconomic structures powerfully affect the welfare of all people – would be difficult to

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<sup>41</sup> Pogge, *supra* note 198, at 1, 2.

<sup>42</sup> Pogge, *World Poverty*, *supra* note 156, at 23.

<sup>43</sup> *Id.* at 152.

<sup>44</sup> *Id.* at 196. We should note that to provide an effective justification for the resource-dividend proposal, one would need to show more than that certain harms have been caused directly by the WTO system. Pogge points to three justifications, any of which, he argues, would be sufficient to support his proposal: (1) widespread poverty is the effect of a shared institutional order, one shaped and imposed by the better off upon the worse off, *id.*; (2) there is no plausible justification for the affluent having much larger entitlements over natural resources than the poor; and (3) the "social starting positions of the worse-off and the better-off have emerged from a single historical process that was pervaded by massive, grievous wrongs." Pogge, *World Poverty*, *supra* note 156, at 198-99, 203.

Pogge also advances a far-reaching proposal for "gradual global institutional reform" that would disperse "political authority over nested territorial units" so as to "decrease the intensity of the struggle for power and wealth within and among states, thereby reducing the incidence of war, poverty, and oppression." *Id.* at 168. This, however, would be a very ambitious interpretation of what his human rights and negative duties arguments have established and, in any event, goes beyond our purposes here.

contest. The principal empirical assertion underlying Pogge's arguments – that the WTO has helped cause massive poverty in the developing world--is subject to considerably more dispute. It is beyond our capacity to resolve that dispute here. Suffice it to say for the time being that even a reader who gets off the bus before Pogge's stop should find Beitz's argument compelling. For us, that is plenty.

### 3. Robust Cosmopolitanism

Beitz's observation that global socioeconomic structures are rapidly becoming more important determinants of people's welfare than the decisions of national governments has implications that go beyond the recognition of moral duties among nations. Taken to its limit, it would require us to cease treating "national boundaries as having fundamental moral significance," and thus would require the full application of principles of distributive justice on a global scale.<sup>45</sup> If we followed this route, we would arrive at a theory sometimes known as "robust cosmopolitanism."

One sweeping version of robust cosmopolitanism is that advanced by Professor Kai Nielsen.<sup>46</sup> Nielsen's argument centers on three principles: that all human beings have equal moral worth ("ethical universalism"); that this equal worth mandates equal consideration for all from the perspective of distributive justice ("distributive ethical universalism");<sup>47</sup> [FN213] and that the proper interpretation of equal consideration for the purposes of distributive justice is some form of strong egalitarianism.<sup>48</sup>

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<sup>45</sup> Beitz, *Justice and International Relations*, supra note 177, at 376. Beitz himself concedes that other considerations might argue against ignoring national boundaries completely when applying principles of distributive justice. In particular, sentimental attachment to the institutions of a nation-state may remain sufficiently strong to justify allowing a portion of the wealth of rich countries to be set aside for intra-national redistribution "once a threshold level of international redistributive obligations has been met." *Id.* at 384. His own view is that this argument has little relevance "to the large modern state," but he acknowledges the possibility that it retains some force. *Id.* at 382-83.

<sup>46</sup> See Kai Nielsen, *Globalization and Justice* 225-95 (2003).

<sup>47</sup> All the theorists of distributive justice that we canvassed in Chapter 10, Section D likely would accept some form of ethical universalism, but a number might resist distributive ethical universalism. Those clearly rejecting the latter would include Rawls and Walzer (whose political-liberal and communitarian arguments for distributive justice are explicitly not based on basic principles of ethical universalism). By contrast, Parfit, Frankfurt, and Nussbaum would all endorse some version of it. Parfit and Frankfurt both present their arguments and examples in the form of abstract ethical considerations regarding what people are owed qua persons, without linking their considerations in any way to specific socio-political obligations or institutions. Nussbaum has been at the forefront of strong cosmopolitanism. See generally Martha C. Nussbaum et al., *For Love of Country?* (Joshua Cohen & Joel Rogers eds., 1996). The case of Dworkin is uncertain, as he advances both political-liberal and more universalist justifications for his egalitarianism. See supra notes 104-05 and accompanying text. Elizabeth Anderson's position is also somewhat uncertain, although likely it would stop at a social cosmopolitanism (a cosmopolitan community with nations, not individuals, as the unit of membership), with some additional humanitarian considerations.

<sup>48</sup> See Nielsen, supra note 212, at 232-41. Nielsen's own egalitarianism is an avowedly "eclectic" mix of different interpretations as to what type of distribution a commitment to equality requires (e.g., equality of condition, the difference principle, equality of resources, universal basic capability) and as to what good(s) are to be so distributed (e.g., utility, primary goods, resources, capabilities). See *id.* at 183-86. For our purposes, any of the parenthetical examples, as we have developed them here, would suffice. (Cosmopolitan views raise a range of issues besides those of socio-economic justice, such as those of political organization, which we leave aside.)

More moderate versions of robust cosmopolitanism might replace strong egalitarianism with prioritarianism or sufficientism as the principle required by distributive ethical universalism. But common to all versions of this perspective is the contention that achievement of distributive justice requires attention, not (just) to the claims of nations, but to the claims of individuals – Diogenes’ “citizens of the world.”<sup>49</sup>

An argument this radical in its implications discomfits many liberal theorists.<sup>50</sup> They resist it – and argue for the continued priority of national or domestic distributive claims – on five related grounds. First, they emphasize “relational facts”: residents of a polity are bound together in tight, unchosen relations of cooperation and coercion, and so long as this remains the case, they are justified in treating their obligations to each other as particularly strong, stronger than their duties to the residents of other polities.<sup>51</sup> Second, only a national level state can efficiently manage a territory, its resources, and its residents (at least without building the intolerable levels of concentration of power that would be entailed by a world government), and the health of national governments depends upon the preservation of sentiments of compatriot fraternity or solidarity, which acceptance of robust cosmopolitanism would fray.<sup>52</sup> Third, the kinds of social justice goods provided by welfare states would not survive effacement of national boundaries for distributive purposes, since the social cement needed to sustain such policies is provided by nationalist sentiments.<sup>53</sup> Fourth, national political units enable valuable diversity and experimentalism in ways of organizing social life.<sup>54</sup> Fifth and finally, the attachment of citizens to a national identity is a fine thing in the judgment of liberal theorists when it is based on the affirmation of a set of common civic and political values.<sup>55</sup> In fact, we could go somewhat further and recognize that simply because civic pride and patriotism are important to many people’s identities, and justifiably so, we should resist reforms that would erode those bonds.

A version of the last argument also figures prominently in the work of communitarians, who typically oppose robust cosmopolitanism with even greater fervor. A meaningful life, they commonly contend, depends heavily on nourishing somewhat unchosen and inherited identities, constituted by communities sharing a common heritage of particular

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<sup>49</sup> Diogenes’ purpose in deploying this phrase carries was to urge people to adopt a cosmopolitan or universalist outlook free from strong nationalist or related group loyalties or attachments. Our focus is instead on the policies governing and implemented by social institutions, not the ethics of individual outlook or choice.

<sup>50</sup> Richard Arneson states: “Global egalitarianism strikes many of us as satisfying from the standpoint of principle but counterintuitive in its policy implications. Philosophers have tried to bolster this intuitive sense of unease with principled arguments.” Richard J. Arneson, *Do Patriotic Ties Limit Global Justice Duties?*, 9 *J. Ethics* 127, 127 (2005).

<sup>51</sup> The phrase, “relational facts,” comes from David Miller and is helpfully developed in this context by Christopher Wellman. See Wellman, *supra* note 133, at 537 n.2; see also Blake, *supra* note 90, at 257-58, 265-73, 280-85; Richard Miller, *Cosmopolitan Respect and Patriotic Concern*, 27 *Phil. & Pub. Aff.* 202, 210-15 (1998).

<sup>52</sup> See Rawls, *Law of Peoples*, *supra* note 90, at 36, 38-39.

<sup>53</sup> This is our interpretation of an argument advanced by Kai Nielsen, which might be based more on the practical, rather than solidaritous, advantages for social welfare resulting from the proximity of fellow nationals. See Kai Nielsen, *Toward a Liberal Social Cosmopolitan Nationalism*, 11 *Int’l J. Phil. Stud.* 437, 443-46 (2003).

<sup>54</sup> See Rawls, *Law of Peoples*, *supra* note 90, at 11-12, 39 n. 48; Beitz, *Rawls’ Law of Peoples*, *supra* note 177, at 671-72.

<sup>55</sup> See, e.g., Ronald Dworkin, *Sovereign Virtue*, *supra* note 104, at 224-34; Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in *Global Justice: Nomos XLI*, at 12, 53-60 (Ian Shapiro & Lea Brilmayer eds., 1999).

memories, values, and customs.<sup>56</sup> Robust cosmopolitanism, they claim, does the opposite. It both rests upon and would help to popularize a wholly unattractive conception of "radically deracinated" citizens.<sup>57</sup>

In our view, the first of these objections has little merit. As we have shown, at least as important as national-level "relational facts" of cooperation and coercion are (and have been) analogous relationships between people on opposite sides of national borders.<sup>58</sup> Each of the other objections, however, has some force. National governments may well have some advantages in terms of efficiently managing resources, providing safety nets, preserving political pluralism,<sup>59</sup> and sustaining "communities of memory."<sup>60</sup> Sensitivity to such concerns should make us leery of a theory that treats commitments to one's countrymen as no different from commitments to the residents of other countries. But most advocates of robust cosmopolitanism do not go to such extremes,<sup>61</sup> and we certainly do not need to in order to justify the comparatively modest reforms necessary to alleviate the health crisis in developing countries. Most of us already think of ourselves as simultaneously citizens of cities, states (or provinces), and nations. The arguments adduced in this subpart seem more than enough to warrant thinking of ourselves also (not instead) as citizens of the world – at least when the financial burden of that affiliation would be so minor.

## B. Compromising the Patent System

In Chapter 3, we saw how all developed countries now rely on the patent system to strengthen the market power enjoyed by the developers of new drugs – and thereby to increase the incentives for research and development. Since then, we have been discussing many ways in which the patent system might be adjusted so as to reinforce its beneficial incentive effects,

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<sup>56</sup> See Alasdair MacIntyre, *Lindley Lecture at the University of Kansas: Is Patriotism a Virtue?*, (1984), in *Theorizing Citizenship* 209, 212-15 (Ronald Beiner ed., 1995).

<sup>57</sup> See Walzer, *Spheres of Justice*, *supra* note 137, at 39 (using phrase to criticize utilitarian impartiality in immigration context).

<sup>58</sup> See Chapter 10, Section B. Nielsen refers to these as "the facts of interdependence and dominance" marking the global political economy. Nielsen, *supra* note 214, at 285.

<sup>59</sup> Cf. Roberto Unger, *The Second Way*, Cambridge Boutwood Lectures: Lecture 2, at 3 (2002), available at <http://www.law.harvard.edu/unger/english/docs/corpus2.doc> ("The powers and possibilities of mankind develop, if they are to develop at all, in different directions, as unique forms of life, with distinct institutional embodiments."); Roberto M. Unger, *What Should the Left Propose?* 134 (2006) ("The role of national differences in a world of democracies is to represent a form of moral specialization: humanity can develop its powers and possibilities only by developing them in different directions.").

<sup>60</sup> See William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 *Harv. L. Rev.* 1661, 1748-50 & nn.374-84 (1988). The particular version of this argument elaborated in Fisher, *supra* (and that we find persuasive), is that attachments to political community should be nourished because they can comprise a significant, if not necessary, form of the kinds of social identity that are integral to the good life. This is distinct from a view, often associated with communitarian theory, that places heavy emphasis on the value of given, as opposed to chosen, communal identities, an emphasis that we feel cuts too far into individual self-determination. In addition, the insistence of some communitarian theorists that, to be meaningful, such given communal identities must be thickly particularistic, veers too close to a troubling tribalism.

<sup>61</sup> Indeed, even Nielsen describes himself as a "liberal nationalist" "social cosmopolitan," who recognizes the instrumental value of compatriot priority (primarily in terms of its effectiveness in securing social welfare), while at the same time insisting that it should be given very limited or no scope as long as current conditions of global injustice obtain. See Nielsen, *supra* note 219, at 446-47; Nielsen, *supra* note 212, at 281-95.

while mitigating its pernicious impact on some consumers' access to medicine. The spirit in which we have been exploring these options has been stubbornly instrumental. Patents are means to other ends; nothing more.

Not all commentators on – and users of – the patent system limit themselves to this instrumental perspective. Many supplement it with an argument grounded in theories of desert. Specifically, they contend that pharmaceutical firms deserve the financial returns made possible by strong patent protection because they have invested so much effort and money – and run such big risks – in producing their socially valuable products.

A good example of these intertwined arguments is the following statement by Gerald Mossinghoff, then-president of PhRMA:

Effective patent protection at home and abroad is vitally important to the United States pharmaceutical industry. America's research-based pharmaceutical companies pour millions of dollars into the research and development of new technology every year. Whether this commitment can continue depends greatly upon the extent to which foreign governments allow innovators to be rewarded for their inventiveness, monetary investment, and intellectual labor. For the private sector pharmaceutical industry, which has been the primary source of new therapies for the past four decades, there is little incentive to provide an ever-increasing commitment to research unless there are reasonable expectations of financial return. Only effective patent protection provides the incentives necessary to enable pharmaceutical companies to commit the required resources.<sup>62</sup>

In short, respect for patent rights is essential both to preserve crucial incentives for innovation and to provide the innovators the "rewards" they are due. Do the adjustments to patent law that we have proposed run afoul of either of these two justifications?

Most of the potential objections to our proposals from the first, utilitarian standpoint we have already addressed. In Chapter 10, Section C, we argued that reforms of the patent system necessary to increase the availability in developing countries of drugs that address infectious diseases are not merely consistent with, but required by the maximization of welfare. But opponents will respond that we have missed one fundamental point: unless we permit the pharmaceutical firms to continue to earn reasonable profits, they will simply stop innovating altogether. The result: the residents of developing countries will be no better off, and the rest of us will be much worse off.

A definitive response to that claim would require knowing two things: the magnitude of the profits currently being earned by the firms, and the extent to which those profits would

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<sup>62</sup> Gerald J. Mossinghoff, [Research-Based Pharmaceutical Companies: The Need for Improved Patent Protection Worldwide](#), 2 *J. L. & Tech.* 307, 307 (1987). A similar mixture of arguments can be found in the following statement by Hans Friedrich Beseler, at the time the European Union's Director-General for Trade, in his foreword to a volume on the TRIPS Agreement: "It would probably be true to say that intellectual creations and related efforts would not be undertaken if there was little entitlement to reward." Hans Friedrich Beseler, Foreword to TRIPS Agreement: Agreement on Trade-Related Aspects of Intellectual Property Rights: Enforcement of Intellectual Property Rights 2 (M.C.E.J. Bronckers et al. eds., 2000).

be corroded by the reforms we advocate. The first set of numbers is hard to determine, partly because the firms jealously guard their financial data. But the overarching story is clear enough: between the 1990s and 2005, the pharmaceutical industry was the most profitable industry in the world. It has since slipped a bit, but its profits remain generous. Against that background, the likelihood that the modest burdens on the firms generated by our agenda would cause them to abandon otherwise promising research projects seems small.

The second, subordinate theme in the conventional defense of strong pharmaceutical patents is somewhat harder to assess. The claim that the firms deserve to control (at least for some period of time) uses of the inventions in which they have invested so much is slippery, rooted in intuition more than logic. Getting a grip on it requires returning to its roots – specifically, the writings of John Locke, and determining which if any of its original aspects are germane to the modern pharmaceutical industry.

Three variants of the argument can be found in Locke's Second Treatise.<sup>63</sup> The first posits that we each "own" ourselves, hence our labor, and hence the fruits of our labor when such labor "mixes" with parts of the world that are either unowned or held in common, so long as "enough and as good" of the commons has been left for others' use.<sup>64</sup> Some modern theorists – most notably, Nozick and Justin Hughes – have suggested that this argument provides even stronger support for property rights in intellectual works than it does for property rights in land or moveable objects, because the latter, unlike the former, are typically "exhaustible" or rivalrous in consumption, making it harder to satisfy the requirement that "enough and as good" be left for others.<sup>65</sup> That may be so, but in our view application of this variant of Locke's theory to patent law founders on two more serious problems. First, the move from an intuitively plausible notion of self-possession, as a kind of ethical primitive, to the complicated legal conception of "ownership" over, say, one's creative thoughts or arm movements, conceals a rather large gap in argument. Filling out the latter conception entails choosing among many possible complex combinations of entitlements, justification of any one of which requires significantly more than a simple appeal to an ethical intuition about self-

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<sup>63</sup> John Locke, Second Treatise of Civil Government, in *Two Treatises of Government* (Peter Laslett ed., Cambridge Univ. Press 1970) (1690). Actually, there are at least four distinguishable arguments for a right to private property that one can extract from Locke's text. The three that we explore in the text each seeks to establish an intrinsic right of some sort, viz., a right to ownership based on mixing; a right to the value added by one's labor; or a right to a reward for expended labor. See id. §§ 27-28, 30, 34, 40-43, 44. By contrast, on the fourth reading Locke views property instrumentally. On this account, property rights are justified because (and when) private appropriation is necessary for carrying out certain purposes (such as the beneficial development of agricultural land), which purposes are themselves justified on grounds either of self-preservation, id. § 25, the innate goodness of industriousness as revealed by reason or divine command, id. §§ 32, 34, 35, or general, instrumental, benefits of resource use, id. §§ 26, 34. See Seana Valentine Shiffirin, *Lockean Arguments for Private Intellectual Property*, in *New Essays in the Legal and Political Theory of Property* 138, 143-54 (Stephen R. Munzer ed., 2001). On Shiffirin's reading, then, contrary to Robert Nozick and Justin Hughes, see Hughes, *infra* note 236, and accompanying text, the non-rivalrous nature of intellectual works actually serves to restrict the applicability of Locke's theory to intellectual property, because it means that private appropriation is not needed to enable the sort of control over the commons that may be a prerequisite to effective exploitation of physical resources. Id. at 156-57. While Shiffirin's interpretation is plausible, it remains the case that the versions we discuss, whatever their fidelity to Locke's text, are now firmly established – in American legal and political theory in particular – as normative arguments in their own right.

<sup>64</sup> Locke, *supra* note 234, § 27.

<sup>65</sup> Nozick, *supra* note 18, at 178-82; Justin Hughes, *The Philosophy of Intellectual Property*, 77 *Geo. L.J.* 287, 299-330 (1988).



dominion.<sup>66</sup> Second, whatever rights one thinks that an individual should have over his ideas or movements, it remains, as Nozick points out, quite mysterious to extend, in a quasi-physical manner, their reach to whatever elements they mix with. For instance, asks Nozick, why don't we "lose" what we externalize rather than gain what we mix with?<sup>67</sup>

The second variant asserts that people are morally entitled to the value added by their labor to the preexisting commons,<sup>68</sup> and that that value can be both measured and recouped by permitting the laborers to charge for access to their additions.<sup>69</sup> This argument fares no better. As political philosophers as far apart as Hayek and Rawls have acknowledged, the claim that market valuations fairly measure what workers deserve is undermined by three considerations.<sup>70</sup> First, the morally arbitrary allocation of genes, and the unchosen family and social background that contribute to shaping one's character and opportunities, go a long way toward determining whether one will possess and develop the capacities that enable one to engage in highly valued market activity.<sup>71</sup> Second, what is valued by the market at any one time is the function of supra-individual factors that seem unlikely to reflect moral worth, including historically contingent social consumption patterns and what skills or work others are able and willing to supply. Finally, the price a given good or service fetches on the market is not simply a function of developed traits and social tastes, but is also, to a significant extent, the result of numerous legal and institutional factors that shape the bargaining power of market agents but are irrelevant to the question of moral desert.<sup>72</sup> Further, one of these factors is the specific set of entitlements that comprise any property rights granted over the fruits of one's value-adding labor; the justification of such rights cannot, without circularity, be founded on the market value of that labor.<sup>73</sup>

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<sup>66</sup> An example of the problems papered over by this move is that, for Locke, the liberty that an individual possesses in his person is inalienable, Locke, *supra* note 234, § 23, while the argument from self-dominion is often used to justify conceptions of legal ownership that include the right/power to alienate.

<sup>67</sup> Nozick, *supra* note 18, at 174-75.

<sup>68</sup> For empirical work suggesting that the majority of contemporary Americans and Western Europeans adhere to some version of this view, see J. Stacy Adams & Sara Freedman, *Equity Theory Revisited: Comments and an Annotated Bibliography*, in 9 *Advances in Experimental Soc. Psych.* 43, 47-49 (L. Berkowitz & E. Walster eds., 1976). For the claim that it also finds support among the citizens of former Soviet-bloc countries, see generally Ellen S. Cohn et al., *Distributive and Procedural Justice in Seven Nations*, 24 *Law & Hum. Behav.* 553 (2000). For indications that the view is or has been less widely held in other cultures or eras, see generally Morton Deutsch, *Distributive Justice: A Social-Psychological Perspective* 29, 164-79, 202-03 (1985); David Miller, *Distributive Justice: What the People Think*, 102 *Ethics* 590 (1992). For a sympathetic philosophical presentation of the position (finding it theoretically plausible but practically intractable), see Joel Feinberg, *Social Philosophy* 114-16 (1973).

<sup>69</sup> Whether this is the version that Nozick settles on is unclear, as he is famously ambiguous on the question.

<sup>70</sup> See F.A. Hayek, *The Constitution of Liberty* 85-102 (1960); Rawls, *A Theory of Justice*, *supra* note 41, § 48, at 273.

<sup>71</sup> See Hayek, *supra* note 241, at 94; Rawls, *Theory of Justice*, *supra* note 41, § 13, at 64; § 48, at 274.

<sup>72</sup> See Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases*, 27 *U. Miami L. Rev.* 261, 340-44 (1973); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault*, 15 *Legal Stud. F.* 327, 328-41 (1991); Barbara Fried, *Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution*, 24 *Phil. & Pub. Aff.* 226, 230-40 (1995). These authors are developing arguments pioneered by Robert Hale. See generally Robert Hale, *Bargaining, Duress and Liberty*, 43 *Colum. L. Rev.* 603 (1943); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470 (1923) [hereinafter Hale, *Coercion and Distribution*].

<sup>73</sup> See Morton J. Horwitz, *Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 161-64 (1992) (detailing development of this argument by institutional economists and legal realists Gerard Henderson,

The third variant of the Lockean argument is that it is only fair that a person who expends labor in a socially valued endeavor should receive a return commensurate with his or her effort. In Mill's formulation, this is "that equitable principle, of proportion between remuneration and exertion."<sup>74</sup> In our view, this argument holds up much better than its cousins.<sup>75</sup> To be sure, Rawls, among others, has been interpreted to question it, on the ground that one's ability and willingness to work hard, like one's capacity to create things valued on the market, is determined largely by circumstances over which one has no control.<sup>76</sup> But we agree with James Dick that this "pushes the doctrine of nonresponsibility too far."<sup>77</sup> Such strong determinism is inconsistent with deeply ingrained intuitions regarding personal agency that seem central to ethical deliberation, and that require more argument to dislodge than Rawls provides.<sup>78</sup> Thus, in our view scientists, R&D managers, and others involved in the drug development process do deserve a fair reward for the labor they expend in creating medicinal innovations. Nevertheless, the arguments canvassed in the preceding paragraph have force here as well, raising intricate issues of how to solve the "proportionality" problem that has so long hobbled Lockean property theories. Fortunately, we need not resolve that difficulty here. The reason: the profits necessary to sustain incentives for pharmaceutical research – profits which, as indicated above, would still be reaped after adoption of our proposed reforms – seem more than adequate to supply the firms the "just deserts" to which they are entitled because of the effort their employees expend.

Two other aspects of the Lockean argument reinforce this conclusion. First, most of the proponents of this approach contend that, when two or more parties contribute to a socially valuable product, they deserve rewards commensurate with their respective contributions. A point often overlooked in the discussion of drug patents is the immense

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John R. Commons, and Robert Hale). Note, it is this last point that is most responsive to Nozick's own argument, if indeed it is based on the value-added theory, since he disavows any reliance on notions of morally "deserving" the value of one's labor (thus ostensibly remaining clear of the previous objections). Instead, Nozick advances a thinner notion of morally justified property "entitlements." Nozick, *supra* note 18, at 224-27. However, if the entitlements to be justified contribute to the value of the activity that is itself supposed to undergird their justification, we have a vicious circularity.

<sup>74</sup> John Stuart Mill, *Principles of Political Economy* 5-24 (William J. Ashley ed., 7th ed. 1909), available at <http://www.econlib.org/library/Mill/mlP14.html>.

<sup>75</sup> Note, a further refinement would be for desert to correspond not merely to effort but also to "sacrifice," understood as laboring in endeavors that are above the social average in risk or drudgery. For a searching examination of different possible conceptions of justice-in-earned-income that settles on roughly the same conclusion, see James C. Dick, *How to Justify a Distribution of Earnings*, 4 *Phil. & Pub. Aff.* 248 (1975).

<sup>76</sup> For this interpretation of Rawls, see, for example, Nozick, *supra* note 18, at 214, and Hettinger, *supra* note 231, at 42. However, while Rawls does downgrade the role of individual responsibility in effort, and rejects any role for desert in matters of distributive justice, his position seems ultimately based not on a denial of any individual responsibility over effort, but rather on the view that it is simply too "impracticable" to disentangle the (likely small) role of responsibility from other factors. See Rawls, *Theory of Justice*, *supra* note 41, § 17, at 89, § 48, at 274.

<sup>77</sup> Dick, *supra* note 246, at 257.

<sup>78</sup> Cf. Hettinger, *supra* note 231, at 43 ("[I]f the ability to expend effort is taken to be entirely determined by factors outside a person's control [as Hettinger takes Rawls to argue], the result is a determinism which makes meaningful moral evaluation impossible. If people are responsible for anything, they are responsible for how hard they try, what sacrifices they make, and how moral they are."); Cohen, *supra* note 115, at 915 (arguing that, given that Rawls does not deny any individual responsibility over effort, his actual argument, from impracticability, is insufficient basis for rejecting desert tout court).

contribution to pharmaceutical innovation made by the publicly funded federal and university labs in which the majority of basic and midstream biomedical research is carried out.<sup>79</sup> This amounts to a substantial public subsidy of the industry.<sup>80</sup> Against this background, the firm's moral claim to strong patents over their products seems less strong than the analogous claims of firms in industries less dependent on taxpayer support.

Second, as Nozick points out, compliance with the requirement that "enough and as good" of the knowledge commons is left for others can be achieved only by limiting the duration of an inventor's exclusive rights to the time it would have taken another practitioner in the field to have independently come up with the invention.<sup>81</sup> That this period would be on average considerably shorter than the twenty years (from application date) provided inventors by the current patent system is suggested by the relatively common occurrence of independent simultaneous discoveries in science, and the frequent entrance of "me-too" drugs onto the pharmaceutical market only a few years after the pioneer, many of which seem to be the result not of imitative activity but of the independent efforts of the second-place finisher in the innovation race.<sup>82</sup> Both this and the previous consideration reveal the extent to which an exclusive focus on the first half of the Lockean story (i.e., of individual self-ownership and labor) tends to obscure the social contributions to, and conditioning of, individual acts of creative labor.

In sum, neither the primary, utilitarian theory on which the patent system as a whole is founded, nor the defensible variant of the secondary, labor-desert theory would be violated by increasing, along the lines we propose, the extent to which pharmaceutical firms must conduct research on diseases common in developing countries or by requiring the firms to make the fruits of that research available at low prices to the residents of those countries.

### C. Interfering with the Market in Pharmaceutical Products

In addition to changes in the patent system, we have advocated modifications to many other laws that govern the creation and distribution of medicines. Mild and conventional proposals of this sort include increases in public funding of research and development.<sup>83</sup> Much more radical is the central argument of Chapter 8: that pharmaceutical firms doing business in the United States should be obliged to demonstrate each year that they have achieved a minimum ratio between the health benefits associated with consumption of their products and their gross revenues. Some readers will likely regard all such proposals as illegitimate or unwise interferences with the freedom of the firms and their customers.

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<sup>79</sup> See Chapter 3, Section A.

<sup>80</sup> See Rebecca Eisenberg, [Public Research and Private Development: Patents and Technology Transfer in Government-Sponsored Research](#), 82 *Va. L. Rev.* 1663, 1667-68 (1996); Sheldon Krimsky, [The Profit of Scientific Discovery and Its Normative Implications](#), 75 *Chi-Kent L. Rev.* 15, 36-37 (1999).

<sup>81</sup> Nozick, *supra* note 18, at 182.

<sup>82</sup> For science in general, see Robert Merton, *Singularities and Multiples in Scientific Discovery*, 105 *Proceedings of Am. Phil. Soc'y* 470 (1961). For pharmaceutical innovation, see U.S. Congress, Off. of Tech. Assessment, *Pharmaceutical R & D: Risks and Rewards* 7 (1993) ("[M]uch of the R & D on me-too drugs is not imitative but competitive. The race has one winner and often a field of followers. The R & D costs of those who lose the race but manage ultimately to produce a product may be as high or even higher than the costs of developing the pioneer compound.").

<sup>83</sup> See Chapter 7.

Our first response to this objection is an old and, we hope, uncontroversial point: the shape of all markets, including the market in pharmaceutical products, is already heavily influenced by state action. Somewhat more specifically, all transactions within those markets take place within a legal-institutional framework enforced by government, a framework that shapes considerably the liberty and bargaining power of agents and the resultant distribution of goods. The implication of this observation was emphasized long ago by the Legal Realists: it is circular to attempt to justify libertarian entitlements on values or outcomes that they partially create.

However, the game is far from over. Libertarian or entitlement theorists may evade the force of this response, by spelling out persuasive justifications for how to fix all initial entitlements enforceable by a minimalist state that meet three conditions:

- 1) The justifications must avoid the type of circularity just described;
- 2) The justifications must be grounded either:
  - a. in terms of the entitlement-receiver morally deserving the distributive outcome, or
  - b. at least in powerful distribution-independent moral arguments that can be said plausibly to be innocent of any foreseeable distributional consequences of a defeatingly objectionable sort; and
- 3) The justifications must be determinate enough to structure the subsequent elaboration of the entitlements by lawmakers while continuing to stay free of the objections in (1) and (2).

Skepticism regarding the feasibility of (2) animates (rightly, in our view) the insistence of liberal theorists such as Rawls and Dworkin that liberal justice must engage with the background conditions of social life.<sup>84</sup> And skepticism regarding the feasibility of (3) derives (again, rightly, in our view) from the following arguments developed by legal realist and critical legal studies scholars in their critique of the public-private and state-market distinctions.<sup>85</sup>

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<sup>84</sup> See Rawls, *Justice as Fairness*, supra note at 83, B 1, at 1, B 15, at 52-55 (rejecting normative persuasiveness of non-desert-based procedural defense of libertarian entitlements along lines of Locke and Nozick); Rawls, *Theory of Justice*, supra note 41, B 2, at 6-7, B 41, at 229 (stating that subject of liberal political justice must be "basic structure" of society, which includes not only its political institutions but also its principal social and economic arrangements, in part because "[s]ome decision concerning these background arrangements," which are "the cumulative effect of social and economic legislation," "cannot be avoided" and, further, that "deep inequalities" these arrangements often generate "cannot possibly be justified by an appeal to merit or desert"); Dworkin, *Sovereign Virtue*, supra note 104, at 1-2 (stating that liberal equality before government must concern itself with conditions and outcomes of economic life, which are affected significantly by state rules); id. at 87-89, 110-12 (rejecting as normatively unpersuasive those interpretations of liberal justice that either are fully libertarian in mode of Locke and Nozick, or are attempts to mix libertarian or "laissez-faire" elements with those of initial, or formal, equality). Both Rawls's and Dworkin's discussions in these passages are somewhat ambiguous with respect to whether their positions aim solely at rejection of (2) (both (a) and (b)) or also presume the refutation of (3). The skepticism of many liberal theorists regarding (2)(a) is based in large part on the sorts of considerations adduced above regarding the moral arbitrariness of the extra-legal factors shaping market distribution. For powerful criticisms of Nozick's efforts at meeting the requirements of (2), see generally G.A. Cohen, *Self-Ownership, Freedom and Equality* (1995).

<sup>85</sup> See generally Wesley Newcomb Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16 (1913); Hale, *Coercion and Distribution*, supra note 243; Morris Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 29 (1927); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 *Am. U. L. Rev.* 939 (1985); Joseph Singer, *Legal Realism Now*, 76 *Cal. L. Rev.* 467, 493

Even accepting a plausible moral basis for the initial fixing of entitlements (i.e., accepting (1) and (2) above):

- a) The legal concepts underpinning markets such as "property," "contract," "harm," and so forth, and the rules pertaining thereto, are in many concrete settings highly under-determinate (sometimes containing internal antinomies), and hence their elaboration requires a number of subsequent political-ethical choices in order to select which among many detailed entitlement packages the law should enforce;<sup>86</sup>
- b) Recourse, in settling these questions, to the higher-order premises supplied by the grounding political philosophy that purported to be distributively neutral is often inadequate to choose one package over the others; and
- c) In any case, these choices, being made once the system is up and running, often have some discernibly patterned distributive effects, for which the choosers must acknowledge responsibility.

Libertarian theorists have thus far failed to develop persuasive responses to these contentions. The chances that they will do so seem especially slim when the entitlements at stake are not property and contract rights in general, but rather patent rights, the contours of which are so contestable and so obviously and heavily shaped by the state. How long should a patent last? How far should the scope of a product patent extend to functionally equivalent but structurally different compounds? Is a discovery that facilitates further research but has no immediate medical or industrial application sufficiently "useful" to warrant patent protection? By what standards should we determine whether a particular innovation was "nonobvious"? Questions of these sorts arise constantly, powerfully affect the fortunes of the actors in the healthcare market, and cannot be answered through application of a theory that meets condition (2), above.

Even if opponents of our proposals concede defeat on this fundamental issue, they are likely to continue to resist on more prudential grounds. It is unwise, they will probably argue, for governments to try to shape private firms' decisions concerning which lines of research to pursue or which markets to penetrate. Rather, social welfare will be maximized if firms make those decisions in response to the signals sent by individual consumers. Putting aside the problems associated with this argument in general, it is especially unconvincing in the context of pharmaceutical products, where so many circumstances render consumers' decisions uninformed. Among the more important: greatly asymmetric knowledge between firms and consumers regarding the benefits and risks of drugs; considerable asymmetries of information (and of the time needed to make evaluations) between firms and the doctors that prescribe the drugs to end-consumers; and the "capture" of some doctors and health insurance providers by patent-holding firms, prompting those intermediaries to steer patients toward certain medicinal options. As we saw in Chapter 3, these sources of distortion are compounded by advertising campaigns, whose effectiveness is increased by the fact that health

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(1988); Horwitz, *supra* note 244, at 163-66, 206-08 (1992); William W. Fisher et al., *American Legal Realism* 8, 98-100 (1993); Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 561, 567-70, 616-41 (1982); Mark Kelman, *A Guide to Critical Legal Studies* 3-5, 102-07 (1987).

<sup>86</sup> To the extent that a version of this point was acknowledged by Hayek (see Hayek references cited *supra* note 88 in relation to the "first point"), the challenge against him would emphasize points (2)(b) and the following points (b) and (c).

insurance makes many consumers price insensitive, reinforcing the allure of well-promoted products. Finally, in the healthcare sector more generally, such distortions exist alongside problems arising from the conflicting demands on healthcare providers (promoting maximum well-being versus cost-sensitivity) and issues of moral hazard and adverse selection for health-policy literature that pervasive market failures necessitate the overt participation by governments in the allocation of healthcare dollars.<sup>87</sup>

Of course, particular examples or forms of governmental regulation of the pharmaceutical market or the healthcare market more generally may suffer from more specific infirmities. The information available to government officials in a particular context may be even worse than that available to private actors. Bureaucracies are bad at some tasks. Certain decision-making procedures by government agencies may invite "capture" by the regulated firms. And so forth. In our review of the various ways in which the law might be changed in order to alleviate the health crisis in the developing world, we have tried to take such hazards into account. But, for the reasons outlined above, an objection to our proposals based on a general commitment to "laissez-faire" seems to us to have little force.

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<sup>87</sup> For reviews of the literature, see Einer Elhauge, *supra* note 141, at 1452-57; Rai, *supra* note 69, at 1015-18. Elhauge identifies another troubling factor – a moral absolutism (roughly: you cannot put a price on human life and health) that pervades our society's discussions and decisions regarding health issues, making realistic cost tradeoffs especially difficult to administer, as well as creating a market environment that welcomes and is willing to pay for any advance in medical technology, no matter how small or expensive the improvement. Elhauge, *supra*, at 1459-61.