“A Point So Fundamental: Nozick on Intellectual Property"

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ABSTRACT

In *Anarchy, State and Utopia*, Nozick defends a libertarian theory of property rights under a minimal state. Whether libertarian theory supports or excludes intellectual property (IP) rights remains controversial. This paper shows that, although Nozick only mentions intellectual property (IP) a few times in the book, these discussions turn out to be surprisingly pivotal for his arguments. Indeed, Nozick calls IP rights a “fundamental” issue for libertarian theory. So, it is important to analyse the structural, methodological, and substantive implications of what Nozick says (and does not say) about IP rights. I will show that, in Part 1 of ASU, IP rights illustrate the non-ideal problems of persistent libertarian disagreement and deep value pluralism that libertarian protective associations need to come to terms with (whether through battle or reconciliation). In Part 2 of ASU, Nozick discusses patents to illustrate the problems related to determining the justice of original appropriation and the limits of the Lockean Proviso. Overall, Nozick’s discussion of IP rights illuminates the somewhat neglected role of *non-ideal libertarian theory*, epistemic indeterminacy, counterfactual reasoning, and the role of pragmatic, “rule-of-thumb” remedies in Nozick’s theory. In the final analysis, Nozick does not develop a fully coherent picture of IP rights, and his proposed solution, putting time limits on patents, seems somewhat *ad hoc*. Although IP rights play an underappreciated role in the book, his discussion raises more questions than it answers. The Nozickean answer is that the epistemically humble libertarian (or liberal) has to approach the regulation of IP rights, and other thorny issues of real-world property-ownership, with an open mind.

Keywords: Nozick; intellectual property; patents; rights; disagreement

1. Introduction

Intellectual property (IP) rights are both fundamental to libertarian theory and, despite this fact, surprisingly sidelined by many of its key texts. Although more consequentialist-leaning classical liberals (Epstein 2001, 2006; Hayek 2011) have been major contributors to the IP debate, the arch-theorist of libertarian rights, Nozick (1974), seemingly glosses over the topic in his magnum opus. This is somewhat odd, since IP rights are a core aspect of propertarian theory deserving of extensive theoretical treatment. From a deontological perspective, it matters considerably whether IP rights are legitimate exercises of individual freedom or illegitimate infringements thereof. In addition, the economic consequences of the IP regime are profound. Indeed, patents, copyrights, and trademarks are among the most lucrative financial assets today. In my view, this sidelining of the issue means that much of libertarian theory is ill-equipped to analyse and judge - let alone *govern* - an innovation economy characterized by IP rights. Nozick's theory of justice, being a pinnacle of libertarian philosophy, provides hope for an answer. However, I shall show that his discussion of IP, while pivotal and consequential in his theory, is far from satisfactory. Indeed, it opens a whole Pandora's box of philosophical worries.

Discovering what our theory of justice should say about IP rights has importance beyond libertarian scholarship. IP scholars tend to agree that "[i]ntellectual property is big business today, so big that any mistakes in the legal design of the field could easily generate deleterious consequences." (Epstein 2001, p. 803). The rights and welfare of both consumers and producers are shaped by the chosen IP framework. It is therefore vital to get its ethical, legal, and economic building blocks in order. From the consequentialist and economic point of view, the primary *aim* of IP rights is to encourage industry, innovation, and productivity by granting creators and inventors an exclusive, usually time-limited, publicly recognized right to the use and development of their ideas. (Landes & Posner 2004). While IP rights can facilitate innovation (Haber & Lamoreaux 2023), IP rights can also have various anti-competitive and anti-innovation effects that cast doubt on their overall contribution to productivity. (Heller 2008; Lessig 2001) This means that the economically optimal level of IP protection is exceedingly difficult to determine, although it is probably above zero. (Goodman & Lehto, 2024) Indeed, economic and legal scholars remain highly divided on the expected costs and benefits of IP rights. To quote Richard Posner (2005): "Unfortunately, economists do not know whether the existing system of intellectual property rights is, or for that matter

whether any other system of intellectual property rights would be, a source of net social utility."

Non-consequentialist libertarians, including Nozick, tend to care less about such consequentialist calculations than about the nature of the link between IP rights and individual freedom. IP rights are a fundamental issue for the libertarian theory because scholars cannot seem to agree whether they are a legitimate sub-species of property rights (Epstein 2006; Mossoff 2005; Moore 2012) or a state-created monopoly privilege (Boldrin & Levine 2008; Blackstone 2016). On the pro-IP side, Ayn Rand (1966) famously defended strong forms of intellectual property as fundamental to a propertarian conception of individual freedom: "Patents and copyrights are the legal implementation of the base of all property rights: a man's right to the product of his mind." A century earlier, in *Social Statics*, Herbert Spencer (1851, p. 88) made a similar point:

> "That a man's right to the produce of his brain is equally valid with his right to the produce of his hands, is a fact which has yet obtained but a very imperfect recognition. It is true that we have patent laws, a law of copyright, and acts for the registration of designs; but these, or at any rate two of them, have been enacted not so much in obedience to the dictates of justice, as in deference to the suggestions of trade policy. A patent is not a thing which can be claimed as a right, we are told by legal authorities, but is intended to act as a stimulus to industry and talent."

The most extreme version of this argument was perhaps made by Lysander Spooner (1855), who defended *perpetual* (non-time-limited) patents and copyrights on the basis of a perfect analogy between physical and non-physical goods: "A man's ideas are his property. They are his for enjoyment, and his for use. Other men do not own his ideas. He has a right, as against all other men, to absolute dominion over his ideas." This means that weak or time-limited IP rights would violate creators' rights to perpetual dominion.

At the other extreme, you have libertarians who, on equally firm grounds, reject the validity of IP rights altogether. The strong libertarian anti-IP stance is usually rooted in one or both of the following two premises: 1) the *monopolistic (or anti-competitive) nature of IP*, which supposedly renders them incompatible with the free market economy, and 2) the *non-rivalrous and/or non-scarce nature of non-physical goods*, which supposedly renders them immune against the traditional, scarcity-based and rivalry-based justifications of (physical) property. With reference to the first, Benjamin Tucker (2018, p. 185) dismissed IP as one of the big "Four Monopolies" (the other three being land, money, and tariffs), "which consists in

protecting inventors and authors against competition for a period long enough to enable them to extort from the people a reward enormously in excess of the labor measure of their services." On the other hand, appealing more to the second premise, building on a foundation laid by Thomas Jefferson (1813), Stephan Kinsella (2008; see also 2023) has argued that "[p]roperty rights can apply only to scarce resources. The problem with IP rights is that the ideal objects protected by IP rights are not scarce; and, further, that such property rights are not, and cannot be, allocated in accordance with the first occupier homesteading rule." This brief survey of the field shows that fundamental disagreements of this issue render the problem of libertarian IP disagreement real and pertinent. (Similar disagreements occur in non-libertarian theories of justice, but I will limit myself to the libertarian debate here.) Unless such issues are resolved, whether IP rights buttress or undermine libertarian justice remains unknowable. There is no clearcut, "text book" solution. And, if our chosen book is *Anarchy, State and Utopia,* all of these familiar problems identified by the above authors recur with familiar force, but the problems multiply even further. Nozick, in his typically ingenuous way, manages to shed new light on an old topic, but he ultimately manages to *poke more holes* in the libertarian arguments for IP rights.

In *Anarchy State and Utopia (ASU)*, Nozick (1974) famously defends the right of unilateral appropriation of physical resources (the principle of justice in acquisition) modified by a weak Lockean proviso. (Locke 1988) The issue of intellectual (as opposed to physical) property is touched upon in the margins of the discussion, in the form of patents and copyrights (ASU, p. 141 & pp. 181-182). Nozick, like many libertarians, seems ambivalent on the issue of intellectual property. In the first instance, in *Part 1*, he uses the example of IP to illustrate *lingering disagreements* among libertarians on fundamental points. He does not ultimately fully integrate IP into his theory of justice, but nor does he reject it altogether. Instead, he argues that some dominant protective associations (or minimal states) could integrate the protection of various IP rights into their conception of justice while others may equally legitimately reject them (without falling outside of libertarian theory). This illustrates the problem of *deep IP disagreement.* Then, in *Part 2*, in the middle of his account of the historical entitlement theory of justice, Nozick suggests a strangely pragmatic, non-ideal approach to patents: a system of time limited patent rights that claim to accommodate the Lockean Proviso in light of the problem of independent discovery. This discussion, too, turns out to be much more pivotal and consequential than it initially seems, since it is used to motivate sweeping claims about the justice of capitalism.

My aim in this paper is to show why Nozick's scattered discussions of IP in ASU are far more important than is usually acknowledged to fully grasp the appeal and limitations of his

libertarianism. So, this paper will focus narrowly on a close reading - exegetical and critical - of Parts 1 and 2 of ASU. (Unfortunately, IP rights are not discussed at all in *Part 3*, *Utopia*.) In my reading of the text, the libertarian justification of IP is neither self-evidently demanded by Nozick's theory nor automatically excluded by it. Nozick embraces a nuanced view of IP that recognises its theoretical and empirical intractability. The fact that Nozick says relatively little about IP is itself interesting. But what Nozick *does* say is both enlightening and frustrating - and ultimately highly puzzling - for the nature, scope, and future of libertarian theory.

The structure of the paper proceeds as follows. In **section 2**, I explore what Nozick says about IP in *Part 1* of the ASU, in the context of the emergentist, invisible hand account of the (ultra)minimal state, where IP is introduced as a paradigmatic example of the sort of deep diversity and disagreement that pluralistic societies tend to be highly susceptible to, and that protective associations therefore also need to take seriously as hurdles to be overcome (whether through battle, buy-out, or convergence). In **section 3**, I explore how Nozick introduces IP in the context of *Part 2* of the ASU as an example of a special (but *not* unique) kind of property that illustrates concerns about the activation or non-activation of the Proviso in the context of Lockean appropriation. This discussion, too, turns out to have significant, potentially troubling implications for his theory, since it exposes the historical entitlement theory to temptations away from "ideal" libertarianism. **Section 4** concludes.

2. IP and Anarchy

In *Part 1* of ASU Nozick first broaches the topic of IP, but in a manner that is highly unexpected. Whereas his discussion of patents in *Part 2* focuses on the question of whether IP rights are a legitimate (albeit peculiar) form of Lockean property (the topic of my next section), he introduces IP rights in *Part 1* for a seemingly different purpose, namely, to show that a) conflict and disagreements are seemingly inevitable in any diverse, pluralistic population, that b) this deep disagreement matters for any moral and political theory, and that c) a minimal state is probably needed to settle disputes, even among libertarians.

The IP discussion occurs in *Part 1, Chapter 6, "Further Considerations on the Argument for the State,"* starting from the subsection titled "*The right of all to punish,"* which deals with the legitimacy and extent of the punitive rights of "dominant protective associations" (DPA), i.e.,

Nozick's hypothetical "invisible hand" precursors to the state. Importantly, this discussion comes near the very end of *Part 1*, just before the beginning of *Part 2: Beyond the Minimal State*. Only a brief section on "preventive restraint" comes in between the discussion of IP rights and the conclusion of *Part 1*. Given how little attention these interludes on IP have garnered, it is worth noting how surprisingly pivotal their placement, and how consequential their conclusions, are for Nozick's broader arguments about libertarian justice. They are *pivotal*, not merely because they occur at the end of *Anarchy*, but because they occur at the culmination of Nozick's argument for the emergence of the minimal state. IP rights occur at the moment when the stability of the minimal state is expected and tested, as a sort of final obstacle to overcome - and seemingly one that may never be fully overcome. This also makes IP rights *consequential*. The presence of deep disagreement and contestation does a lot of work in, on the one hand, helping to justify the minarchist against the anarchist and, on the other hand, showing how Nozick's epistemic motivations, if taken seriously, continue to eat away at the long-term stability and foundations of the libertarian theory itself. Nozick writes:

> "Consider, for example, the issue of whether full-blooded copyright is legitimate. Some libertarians argue it isn't legitimate (…). Other libertarians disagree. Similarly for patents. If persons so close in general theory can *disagree over a point so fundamental*, two libertarian protective agencies might manage to do battle over it." (Nozick, ASU, p. 141, my italics)

The obvious need to resolve such disputes makes "the apparatus of the state" more attractive. (ASU, p. 141) Nozick immediately qualifies this "archist" temptation, however, by suggesting that truly peace-preferring agencies might keep peace even without a state. (ASU, pp. 141-142) This again reinforces the exploratory, inconclusive nature of his argument. At any rate, Nozick considers the legitimacy of IP rights a *"fundamental" point of contention* that libertarians do not have, and will likely never have, full agreement on. This is certainly an accurate statement of the history of libertarian thought. As I showed in the previous section, for every libertarian convinced by Tucker's or Kinsella's arguments against IP you can find someone convinced by Rand's or Spencer's arguments in its favour. Narratively, Nozick's discussion of IP thus underlines his case for the persistence and inevitability of lingering normative and legal uncertainties and disagreements *even in a libertarian society*. This fact of persistent disagreement in turn grounds his hypothetical account of the "invisible hand" story of the emergence of the dominant protective association (DPA) as a legitimate monopolistic punisher - which was a major stated goal of *Part 1* of ASU. These passages support my reading of Nozick as a proponent of moderately sceptical,

non-ideal, empirically informed political and moral philosophy, but they also show that this non-ideal theorizing was linked to his more traditionally Kantian-Rawlsian project of grounding a robust theory of state legitimacy, justice, and rights. Interestingly, although his claims about widespread IP disagreement among libertarians are sociologically accurate, it is somewhat odd that we are not given any hint here about whether *Nozick himself* considered IP rights legitimate. This silence is suggestive, but instead of speculating, let me continue. (His own views on IP are clarified, if only in part, in ASU's *Part 2*.)

As the passage above shows, Nozick's first discussion of IP rights occurs in the context of his exploration of the epistemic limits of moral and political theory, as these pertain to our ability to model, predict, or forestall *social conflict, diversity, and disagreement*. Absent a minimal state, there is persistent disagreement and uncertainty about punitive matters: "Even given factual agreement, there might be disagreement about what amount of punishment a particular act deserved, and about which acts deserved punishment." (ASU, p. 141) In all disputes between protective agencies, both *matters of fact* (forensic facts) and *matters of value/fairness* (ethical facts), are amenable to contestation and disagreement. Among other things, this leads Nozick to argue, against Locke, for the legitimacy of the prohibition of "unreliable procedures" of justice: "When only one agency actually exercises the right to prohibit others from using their unreliable procedures for enforcing justice, that makes it the de facto state. Our rationale for this prohibition rests on the ignorance, uncertainty, and lack of knowledge of people." (ASU, pp. 140-141)

He expands on this epistemic rationale in a striking passage:

> "I have proceeded in this essay (as much as possible) without questioning or focusing upon the assumption common to much utopian and anarchist theorizing, that there is some set of principles *obvious enough* to be accepted by all men of good will, *precise enough* to give unambiguous guidance in particular situations, *clear enough* so that all will realize its dictates, and *complete enough* to cover all problems that actually will arise." (ASU, p. 141, my italics)

Although he does not deny the possibility outright, Nozick seems sceptical towards the possibility of ever achieving sufficient *obviousness, precision, clarity, and completeness* of libertarian theory. The reasons for disagreement (and pluralism) are multiple:

a) The *obviousness* and *clarity* conditions imply *sociological* (or *communicative rationality*) constraints. What seems obvious or clear to one person may never become so to another. This may be a limitation of human sociability, or

of the human language, or of our capacity to listen and learn, that undermines the possibility of a convergence around a shared set of principles, and thus the possibility of public reason libertarianism.

b) The *preciseness* and *completeness* conditions imply *conceptual* (or *philosophical*) constraints that are independent of, and supersede, the sociological constraints. They suggest something like the following worry: *even if* the obviousness and clarity constraints could be overcome - that is, *even if* the channels of communicative rationality were fully leveraged to achieve sufficient public reason convergence around a shared set of principles - the lingering *imprecision* and *incompleteness* of those principles (presumably *any* principles) would render them unstable and maladaptive over time, as times, habits, ideas, and circumstances change. (Similar to Gaus, 2018.)

Nozick, typical to his self-deconstructive mode of argumentation, exposes the weaknesses of his own project - which, of course, is wholly admirable from a Popperian fallibilist and critical rationalist point of view. At the very least, what Nozick says here in *Part 1* makes the historical entitlement theory of *Part 2* seem less plausible as a means of uniting people under the banner of the minimal state. Presumably, even the historical entitlement theory struggles to achieve a sufficient level of obviousness, clarity, preciseness, and completeness to stand as a universal, eternal set of principles of justice. The empirical uncertainties that arise when the Lockean Proviso, the principle of rectification, and other aspects of his historical entitlement theory are pitted against a mostly illegible, sparse, and ambiguous historical record exemplify this worry. But this is not necessarily a fatal problem. Much depends on *what* we take Nozick's core contribution, vision, and aim to be. Is Nozickian philosophy mostly about finding and defending secure foundations, unerring judgments, and fixed principles? Or is it mostly about exploring and unearthing Socratic puzzles and unresolved tensions in moral, social, and political theory? The latter is suggested by his repeated appeal to *empirical uncertainties*, and his early insistence that "there is room for words on subjects other than last words." (ASU, p. xii) To avoid creating a false dichotomy, it is best to read Nozick as *both* a philosopher of first principles, *and* a philosopher of incompleteness, exploration, and hesitation. This dual image fits his self-described aims, and it makes most sense of his discussion of IP. Nozickian philosophy is not only about articulating clear, coherent, abstract principles, but also about exploring the Socratic puzzles that arise when those principles confront a complex, uncertain world.

For example, Nozick's discussion of patents is immediately preceded by, and seemingly motivated by, a strong assertion of scepticism regarding convergence on universal or final principles of justice: "Not only does the day seem distant when all men of good will shall agree to libertarian principles; these principles have not been completely stated, nor is there now one unique set of principles agreed to by all libertarians." (ASU, p. 141) Rather than a call for pessimism or nihilism as such, this is an invitation for the pursuit of moral and political philosophy in a happy "non-ideal" mode, which centers the need for mutual respect, pluralism, commitment to open-mindedness, and an explicit recognition of the constraints of deep diversity. This, I believe, is what he has sought to achieve in *Part 1*: it is not merely a story of how minarchism can be created without violence. It is also a story about how persistent social conflict and disagreement can be dealt with. The most straightforward way to read this is that Nozick was fully aware that his own arguments for the minimal state and libertarian rights would be subject to similar constraints. This point is worth keeping in mind when I discuss the peculiar things that he says about IP rights later on in the book. Nonetheless, it is important to avoid needlessly stark binary divisions and caricatures: my desire to emphasise this "non-ideal" aspect of Nozick's thought should not be misconstrued as a denial of his commitment to the normative project of Kantian rights and justice. It would be more accurate to say that, in ASU, he was *both* a defender of the historical entitlement theory of justice *and* a tireless pursuer of philosophical puzzles and paradoxes.

Before moving on, let me summarise what Nozick does with IP in *Part 1* of ASU. Nozick's takeaway of the IP issue is that *disagreement* (in the general public and even among libertarians) is widespread. Disagreement among people who hold vastly different value systems is one thing, but disagreement among people who are otherwise close to each other in values and principles imposes an even more serious and endemic problem. This fact of deep diversity and disagreement imposes an important "non-ideal theory" constraint on political theory, which supports the reading of Nozick as a sceptical, cautious philosopher. It is of course true that he recognizes a legitimate role for the state as the implementor of the historical entitlement theory of justice. Here, however, he emphasizes that the state is probably also needed for a different function, namely, to enforce a satisfying (or "satisficing") moral and legal procedure that minimises social conflict for any diverse group by acting as a Schelling point of coordination (which he explicitly mentions on p. 140). Rules of justice, including punitive rules, further change over time, which demands an umpire: "Disagreements about what is to be enforced (…) provide yet another reason (in addition to lack of factual knowledge) for the apparatus of the state; as also does the need for sometimes changing the content of what is to be enforced." (ASU, pp. 141-142) Although the

anarchist may have more tricks up their sleeve, this pushes the needle towards (min)archism.

It is striking that the issue of IP is raised to illustrate unresolvable moral and legal disagreement. This disagreement - or deep diversity - jeopardises the stability and achievability of the social order, while it also buttresses the specific argument for the minimal state against the anarcho-capitalist. But why pick *that* example over others? Is Nozick making a sociological observation about libertarians (himself included)? Is there something specific about IP that makes it conducive (for libertarians) to such disagreement? One plausible answer is that he picked the example because he does not know what to think about IP himself. This is suggested by the fact that, as I shall show in the next section, although he makes some quick gestures in the direction of a moderately pro-IP position in the context of his historical entitlement theory, he fails (or refuses?) to commit to an unambiguous position even there. This suggests that IP rights are especially thorny for his special branch of libertarian theory that appeals to historical entitlement, including its Proviso-constrained chain of appropriation, transfer, and rectification.

In the next section, I buttress the point that IP rights pose unsettling problems for the plausibility of Nozickean rights theory, *if* this is understood (or misunderstood) as a "complete" theory equipped to tackle any and every contingency. If, on the other hand, we prefer to understand, as I think we should, Nozick's theory as mostly providing a general, reflective framework for normative theorizing that requires the intermediate intervention of cutting-edge social science and historical analysis before it can be used to make clearcut judgments about the real world, the problems seem less fatal to the broader Nozickean project, albeit at major cost to the straightforward appeal and applicability of his historical entitlement theory of justice. It seems to me that IP rights pose a special problem for some varieties of *deontic right-libertarian*, but not necessarily for the more non-committal, *non-idealising, exploratory Nozickean* - the philosopher who revels in "words other than last words," and who is willing to countenance periodic normative reinterpretations, and perhaps even more fundamental revaluations, of libertarian justice's demands. Rather than undermining his intuitive Kantian and Lockean foundations, Nozick believed that the historical entitlement theory of justice would be more appealing if it were shown to be robust enough to withstand difficult, real-world scenarios. This explains his strangely ambivalent treatment of IP as *both* a robust pillar, *and* a hurdle, to his theoretical edifice.

3. IP and the State

In *Part 2* of ASU, Nozick returns to the topic of IP in a completely different context. Here, Nozick makes a nuanced, qualified defense of patents (copyrights are no longer mentioned), as a legitimate form of Lockean property. More specifically, his discussion of IP rights seeks to illuminate the circumstances that matter for determining whether, when, and how various kinds of things, such as natural resources, physical goods, and ideas, can be appropriated without violating the Lockean proviso. This IP discussion occurs, again, in a pivotal and consequential moment in his argument, at the end of *Part 2, Section 1*. Nozick uses the example of patents to vindicate the historical entitlement theory, by showing that it can account for, and partly overcome, the limitations set by the Lockean proviso. I shall show that, at the same time, his discussion of IP rights is unsatisfactory and it reveals several fissures and lingering uncertainties within his theory. Instead of a single Nozickean approach to IP, there may yet be *numerous Nozickean IP pathways*, some of which are highly supportive of IP rights, while others are more critical of it. This discussion again highlights the need to read Nozick as an open-ended, exploratory, non-idealistic philosopher, who was ultimately unwilling to sacrifice his Socratic spirit on the altar of ideological clarity.

Since the details of Nozick's historical entitlement theory are well-known, I will only briefly summarize its tenets. In the theory, individuals have 1) the right to appropriate originally unowned things, 2) the right to transfer them by voluntary contract, and 3) recourse to a supporting principle of rectification that corrects for past injustices. Most pertinently for patents, the right to original appropriation is limited by the "Lockean Proviso." (ASU, pp. 178-182) The Proviso forbids takings that leave people with less than "enough and as good" as before, which Nozick interprets as a (quasi-Paretian) "no worsening" condition. He assumes appropriation to be justified as long as it does not leave others in a *worse* position than they would be in the *status quo ante* (as opposed to, say, compared to some more egalitarian scheme). Nozick further argues that, since private property makes society so much wealthier (in a way that benefits all or most people), "the question of the Lockean proviso being violated arises only in the case of catastrophe (or a desert-island situation)." (ASU, p. 181) For Nozickeans, and Lockeans more generally, the proviso can be seen as applying at multiple levels at once: to individual acts of appropriation, to subsequent transfers, and to the legitimacy of the property system as a whole. Its scope and application have been debated endlessly. (Moore 2012; Lambrecht 2015)

Similar to the structural placement of the IP discussion in *Part 1*, which turned out to be surprisingly pivotal and consequential to his broader theory, the same is true, *a fortiori*, of his discussion in *Part 2*. Although superficially inconsequential and marginal at first, the discussion of IP rights in *Part 2* appears at the very crux of the argument defending, in general and ambitious terms, *the overall legitimacy of current property holdings and "actually existing" capitalism*. In fact, right after Nozick's discussion of patents, following his concession that putting time limits on patents may be justified by the Proviso, comes his infamous, self-declared "empirical-historical claim" about today's world: "I believe that the free operation of a market system will not actually run afoul of the Lockean proviso. (...) If this is correct, the proviso (…) will not provide a significant opportunity for future state action." (ASU, p. 182) So, the discussion of patents, which initially seems marginal to his overall project, not only directly precedes, but also provides the immediate motivation for one of the most controversial and consequential claims in the book! (From the context, I suspect that this is because Nozick sees that it opens up a nasty can of worms that threatens to expand, without limit, the applications of the Lockean Proviso.)

Let me get deeper into the nitty gritty of his theory. Nozick's justification for *patent appropriation* (and, in general, appropriation in ideas) arises as a) a seemingly legitimate type of appropriation that nonetheless b) may violate, under some conditions, the Proviso in systematic and intolerable ways, c) unless some sufficiently Proviso-respecting remedy is introduced. Before discussing patents, Nozick illustrates his theory of Lockean appropriation with hypothetical, increasingly IP-like cases: 1) an explorer *discovers* a new substance (physical appropriation, *simpliciter*), 2) a medical doctor *synthesises* a new substance (a hybrid form of physical *and* intellectual appropriation), and, finally, 3) someone *patents* their invention (intellectual appropriation, *simpliciter*). This scale presupposes the general appropriateness of the analogy between physical and intellectual property, while also trying to accommodate some of the peculiarities surrounding the creation and dissemination of ideas. It brings some clarity to the debate. But the remedies included are too quick and *ad hoc*. In fact, this IP discussion opens up a whole can of worms for Nozick.

Case 1 concerns the *discovery* of a new substance:

> "Someone finds a new substance in an out-of-the-way place. He discovers that it effectively treats a certain disease and appropriates the total supply. He does not worsen the situation of others (…). However, *as time passes, the likelihood increases* that others would have come across the substance; upon this fact might be based a

> limit to his property right in the substance so that others are not below their baseline position; (…) for example, *its bequest might be limited*." (ASU, p. 181, my italics)

Remember that we are still talking about a *physical* good, i.e., a naturally occurring substance that presumably exists in nature in scarce supply. His concession regarding *limited bequest* as a potential solution to the Lockean Proviso raises obvious theoretical worries. It seems plausible that latecomers to an undiscovered substance are harmed by unilateral appropriation without compensation. But does this logic not extend to all physical property? Why does this argument not equally justify putting limits on the right to bequest to *all* property? Let me bracket this issue for now.

Case 2, the *synthesis* of a new substance, constitutes Nozick's attempt to formulate a kind of intermediate step between "purely" physical discovery and "purely" intellectual creation:

> "A medical researcher who synthesizes a new substance that effectively treats a certain disease and who refuses to sell except on his terms *does not worsen the situation of others by depriving them of whatever he has appropriated*. The others easily can possess the same materials he appropriated; the researcher's appropriation or purchase of chemicals didn't make those chemicals scarce in a way so as to violate the Lockean proviso." (ASU, p. 181, my italics)

Note that there is still no mention of patents. The background institutional context is underspecified. It might be profitable to interpret Nozick, here, as assuming that intellectual property rights are *not* yet in existence, since patents are introduced in the next example. At any rate, it is obvious that, physically speaking, the synthesis of a new drug can be achieved with or without patent rights. Physical property rights already fully protect the owner's exclusive right to use, enjoy, and modify their goods, including the synthesis of new chemicals. Likewise, the doctor's "refusal to sell" can be fully secured without IP rights, since property owners already have the right not to engage in market transactions. Nor are owners obliged to share or disclose any private information about their inventions to third parties. The only worry is that the absence of patents leaves the inventor vulnerable to others' copying and imitating their actions, which might appear as violating their rights.

This is where Nozick introduces **Case 3,** someone *patenting* an original invention:

> "The theme of someone worsening another's situation by depriving him of something he otherwise would possess may also illuminate the example of patents. An

> inventor's patent does not deprive others of an object which would not exist if not for the inventor. Yet patents would have this effect on others who independently invent the object. Therefore, these independent inventors (...) should not be excluded from utilizing their own invention as they wish (...). Yet we may assume that in the absence of the original invention, sometime later someone else would have come up with it. This suggests placing a time limit on patents, as a rough rule of thumb to approximate how long it would have taken, in the absence of knowledge of the original invention, for independent discovery." (ASU, p. 182)

Before dissecting this, it is worth keeping in mind that Nozick all along assumes the appropriateness of the analogy between physical and intellectual property:

a) Since ideas can be possessed, they *fall under the entitlement theory*.

b) Therefore, ideas can be subject to *appropriation, transfer, and rectification*.

c) Nonetheless, ideas are, Nozick admits, *a peculiar kind of good.*

Although this analogy between physical and intellectual property can be disputed (Strandburg 2008; von Hippel 2017; Potts 2019; Ridley 2020), Nozick runs with it. Despite IP being a *peculiar* good, as long as intellectual property rights are sufficiently analogous to physical property rights, there is no *specific* problem with regard to patents. Their peculiarity is not that different from the peculiarity of scarce water holes in the desert or scarce plots of arable land. Whatever problems haunt Lockean IP rights, they are mostly analogous to the sorts of problems that plague physical Lockean property rights that are equally subject to Proviso constraints. However, Nozick concedes that patenting ideas is unusually susceptible to, and thus neatly illustrates, a peculiar epistemic problem that plagues certain forms of (intellectual and physical) property, namely, the problem of *independent discovery*. Nozick's (ASU, pp. 181-182) argument, here, has roughly the following logical structure:

> ***Premiss 1*****:** "An inventor's patent does not deprive others of an object which would not exist if not for the inventor."
>
> ***Premiss 2***: "Yet patents would have this effect on others who independently invent the object."
>
> ***Premiss 3*** (implicit): It is wrong to deprive independent inventors of what they *would* have in the absence of patents.
>
> ***Conclusion 1*****:** "Therefore, these independent inventors (…) should not be excluded from utilizing their own invention as they wish (including selling it to others).

Additional normative weight is pulled by the following (quite plausible) *empirical, hypothetical, and counterfactual* claim: “Yet we may assume that in the absence of the original invention, *sometime later someone else* would have come up with it.” (my italics) A lot of work is done here with the innocent-sounding phrase, “sometime later someone else.” At any rate, all of the preceding line of reasoning motivates his somewhat surprising solution:

> **Conclusion 2**: “This suggests placing a time limit on patents, *as a rough rule of thumb to approximate how long it would have taken,* in the absence of knowledge of the invention, for independent discovery.” (my italics)

Although reasonable, this conclusion is very dependent on *counterfactuals* and *hypotheticals*. Time limited patents seem like a rather pragmatic, utilitarian solution that fits poorly into Nozick’s account of libertarian rights. In his influential critique of Nozick’s case for IP rights, Maxime Lambrecht (2015, p. 26) raises a similar point: Nozick’s argument “ends up collapsing in a kind of quasi-utilitarian argument, offering neither the certainty of proprietarian reasonings, nor the intuitive appeal of utilitarian ones.” I agree, although some concern for empirical consequences is consistent with, indeed required by, taking the Lockean proviso seriously. The aim of the “approximation” exercise, after all, is not to maximize aggregative output but to eliminate (or minimise) property rights violations, including proviso violations. (ASU, p. 177) The real problem, however, is that time limits severely curtail the rights of inventors based on statistical, averaged-out, hypothetical future scenarios (based on the vague criterion of the future claimant - the “sometime later someone else”).

Perhaps even more worryingly for Nozick, time-limited patents actually *eliminate all individual claim-rights of independent discovery* in favour of a surreptitious, non-specific reversion of the original property right into the (non-contributory) commons. But why would the lapsed patent right revert to the commons, and not, say, get divided equally among the narrower class of expected inventors (those most likely to contribute to independent invention)? Perhaps such a class of potential inventors is difficult to identify - this seems plausible. But unless one assumes, rather fantastically, that every single human being has the equal potential to be an independent discoverer, time-limited patents are a flawed, unattractive, oddly pragmatic, and potentially rights-violating solution to the problem of independent discovery. They do not sufficiently respect *either* the rights of the original appropriator (whose property rights get curtailed against hypothetical future claimants) *or* those of the independent discoverers (who are granted no more protection than the Average Joe despite their, let us assume, significantly higher chances of independent discovery).

This view can also be challenged from an alternative angle. If the scholarship on the "knowledge commons" is to be believed, almost all invention and innovation may be the result of innovation networks and group efforts of the sort that are hard, if not impossible, to credit to single individuals. (Strandburg 2008; von Hippel 2016; Potts 2019; Dekker & Kuchař 2022) This perspective casts fundamental doubt on the very justice of rewarding "original" innovators, since "originality" itself is largely fictitious. But regardless of one's preferred perspective, pursuing the path of counterfactual historical narratives, as Nozick does, forces his deontological framework to become highly sensitive to empirical arguments. This is partly a necessary consequence of the Lockean proviso, combined with this willingness to treat hypothetical scenarios with the seriousness that they deserve. Although a staunchly right-libertarian model *may* survive the scrutiny, this empirical layer opens the door to "rule of thumb" remedies and counterfactual arguments that are difficult to contain, potentially leading the theory in unexpected, including more redistributive directions.

So, as I have shown, in his discussion of IP rights in *Part 2*, Nozick takes several steps towards pragmatic, second-best, non-ideal theorizing. This is both an admirable methodological stance and a dangerous act of self-sabotage that raises many thorny questions, such as: "what else in libertarian theory may be up for grabs, or subject to (re)negotiation, on the basis of counterfactual, rule of thumb reasoning?" Nozick might *want* to object that such rough, "rule of thumb" solutions a) are only needed in rare cases, b) do not undermine his core claims, and, c) anyway, often such imperfect remedies are the best ones we have access to. It may be unreasonable to want our rule of thumb solutions to satisfy (all) our moral intuitions perfectly. Perhaps we should be happy as long as they satisfy our moral demands *better than doing nothing*, assuming that we need to do something to address the Proviso. Fair enough. But it is still Pandora's box. What stops such counterfactual arguments from being applied, beyond time limits on patents, to comparable limits on physical property rights, perhaps in the direction of the Rawlsian difference principle, a Hayekian minimum income guarantee (Hayek, 2011), or other types of "rule of thumb" welfare rights for the poor? (Lomasky 2005) After all, if the second-best, real-world historical entitlement theory has to rely on counterfactual histories, hypothetical futures, and other epistemically murky argumentative strategies, the best Nozickian institutional regime is seriously up in the air. This is not merely a hypothetical worry. Nozick himself seems keenly aware of this possibility in his brief but crucial discussion of the principle of rectification. In the absence of detailed historical information, he suggests that "a rough rule of thumb for rectifying injustices might seem to be the following: organize society so as to maximize the position of whatever group ends up least well-off in the society." (ASU, p. 231) While he calls this example "implausible," his willingness to even consider such a Rawlsian-sounding

principle as a second-best remedy for historical injustice demonstrates just how far the "non-ideal" and "rule of thumb" dimensions of his theory can be pushed. He even goes as far as to say that "one *cannot* use the analysis and theory presented here to condemn any particular scheme of transfer payments" absent thorough investigation. (*Ibid.*)

In practice, Nozick interprets the "no worsening" interpretation of the Proviso in a rather anti-interventionist way, although his pragmatic discussion of patents brings him close to "left-libertarian" territory. (George, 1879; Steiner, 1994) But his own logic invites us to ask: why not subject *all* forms of initial appropriation to the same scrutiny as IP rights? Latecomers to landed property, too, would have undoubtedly come across the land at some point. Does that not mean they, too, have a claim of justice based on "independent discovery"? Nozick might again retort that independent discovery is a unique and rare problem that only affects certain kinds of objects (such as innovations) that have a high chance of being independently created. Perhaps land ownership and other forms of physical ownership are less likely to be subject to similar counterfactual worries. Perhaps. A successful counter-response to Nozick would need to show that real-world conditions frequently "run afoul of the Lockean proviso" in precisely this (or some analogous) way. *Unless such inquiries, well-motivated by the Nozickean theory itself, are pursued to the (bitter) end, it is difficult to know what becomes of propertarianism and libertarianism.* May Nozickean principles tolerate or even mandate schemes like a Land Value Tax (LVT), a wealth tax, or an inheritance tax? Such considerations strengthen Lomasky's (2005) case for a Twin Harvard where Nozick is led, by his own lights, to embrace redistribution.

I do not seek to adjudicate the matter here. I wish to leave the open question hanging in the air; the reader must decide whether it comes off as a bad stench or an alluring perfume! I have only wanted to show that Nozick's discussion of IP, rather than securing the entitlement theory against further encroachments, leaves it wide open to numerous potentially troubling expansions, explorations, and conquests. To rescue right-libertarianism, Nozickeans have to show why (most) physical property is somehow *immune* from the sorts of hypothetical "what-if" and "rule of thumb" calculations that beset patents. This could lead to something approximating "left-Nozickeanism," bringing him closer to Rawlsianism, Georgism, pragmatic neoliberalism, property-owning democracy, social democracy, or some other property-respecting but more statist and redistributive theory. I am partly sympathetic to those new directions, but some Nozickeans may want to either avoid that conclusion entirely or, where this is impossible, at least try to limit the scope of "Nozickean socialism" by more carefully delineating the acceptable range of plausible property rights limitations. This difficult work, seemingly necessary for rescuing right-libertarianism, has barely begun.

At this point, I would love to be able to transition to a section that explores IP rights in ASU's *Utopia*. However, since Nozick does not discuss IP rights in ASU, *Part 3,* I will confine myself to a few scattered observations. First, it is clear that the Utopia section, which is my personal favourite part, again underscores the exploratory, non-ideal nature of Nozick's mode of philosophizing. In *Utopia*, Nozick brings to the fore the deep diversity of human experience, the need for continuous experimentation, and the value of accommodating competing conceptions of justice - issues that he has already highlighted in his discussion of *deep IP disagreement* in *Part 1* of the book. Thinking in terms of the meta-Utopia allows a fresh rethinking and reframing of how the lessons of *Part 1* and *Part 2* can be implemented and perfected in a pluralistic world. Assuming that conceptions of justice vary across the Utopias, so will the non-ideal interpretations of the historical entitlement theory itself. It seems obvious that in some libertarian (and non-libertarian) Utopias, IP rights would be protected, while in others they would be wholly or partly abolished. Indeed, thinking in terms of pluralistic "IP utopias" allows us to overcome the binary nature of the discussion. In a more decentralized, "polycentric" system, (Ostrom 2005) IP rights might be subject to almost infinite variation across multiple metrics (including types of IP rights protected, ease of acquiring them, strength of protection, duration of protection, level of enforcement, severity of sanctions, etc.). Nozick's own recognition of the need to think in terms of "second-best" solutions in the face of widespread ignorance and disagreement justifies exploring the seemingly boundless domain of various pragmatic and "rule of thumb" remedies. Guaranteeing the Utopian flourishing of a thousand non-ideal remedies to the unresolved problems of Lockean libertarianism, whether implemented on the local level, the mid-level of states, or the meta-level of Utopian frameworks, may ultimately become a testament, not to the fragility and fragmentation of the libertarian perspective, but to its "inspiring vision" as a kaleidoscope (ASU, p. 333).

I have tried to show how, in both *Parts 1 and* 2*,* Nozick's treatment of IP appears marginal at first, but ultimately proves pivotal and surprisingly consequential. His (non-absolute) defence of IP rights by quick analogy to physical property rights cements a particular, "right libertarian" reading of the Lockean Proviso that nonetheless opens up new worries about the stability and legitimacy of those very same property rights. His strong emphasis, in this section, on *non-ideal rule of thumb reasoning* and *counterfactual moral justification* seems hard to square with his stated emphasis on actual, historical, observed, recorded, and non-hypothetical patterns of property holdings. His proposed pragmatic solutions, including limiting the right to bequest or limiting the duration of patents, are plausible enough from a consequentialist point of view, but seemingly *ad hoc* and out of character from the

deontological one. However, once we recognize that he never intended his theory to have all the answers, especially concerning real-world implementation, they make sense as tentative early stabs at non-ideal theory that remain subject to further empirical and counterfactual contestation. This dimension need not impact the coherence or plausibility of his core theoretical claims. On the contrary, it shows that his theory has tools to address difficult borderline cases. Although Nozick is rightfully seen as a paradigmatic theorist of libertarian justice that made little compromise with consequentialism, he was also a non-ideal, path-breaking, exploratory philosopher, for whom counterfactual, rule-of-thumb, second-best, and non-ideal reasoning is, in fact, unavoidable in moral and political theory.

4. Conclusion

Nozick considered IP "a point so fundamental" to libertarian theory, yet kept it marginal in his discussion. However, I have shown that this is mostly an illusion. The topic of intellectual property reveals the main pathways and fissures of Nozick's philosophy. Although Nozick does not spill much ink discussing IP rights, they appear strategically, in key sections in the book - in Parts 1 and 2 - to illustrate some of the most important challenges to his theory. IP rights therefore turn out to play multiple underappreciated roles for Nozick:

a) In the *Anarchy* section, *Part 1,* IP rights are used to illustrate lingering disagreements about rights enforcement, not only among the general population (composed of diverse people holding competing comprehensive moral doctrines), but even among libertarians and other otherwise closely aligned groups (composed of mostly "likeminded" people holding similar comprehensive moral doctrines). This emphasises Nozick's concern with the various non-ideal constraints of political, moral, and legal theory.

b) In the *State* section, *Part 2,* patents are used to illustrate the legitimacy of Lockean appropriation, the extent and limits of the Lockean proviso in marginal cases, and the overall justification of (and scope of rectification for) a historical pattern of libertarian holdings. Nozick himself used IP rights to motivate his claim, for which he offered little evidence, that real-world property holdings rarely violate the Lockean proviso. Sceptical readers may see them as highlighting precisely how fragile and contestable such empirical assessments are. More broadly, Nozick's casual embrace of pragmatic remedies, such as time limits on patents and restrictions on bequest, exemplify the underappreciated role of non-ideal theory, epistemic scepticism, counterfactual reasoning, rule-of-thumb policies, and quasi-consequentialist remedies in Nozick's mode of philosophizing. Tackling such issues forces

the *epistemically humbled libertarian* to approach real-world issues of property rights implementation with a more open mind. The challenge for future Nozickeans is therefore not to suppress this exploratory, non-ideal dimension of his thought, but to build on it constructively. This would involve developing principled criteria for determining when "rule of thumb" remedies are justified and how to delineate their scope, a project that might lead to a more robust, empirically-informed libertarianism capable of addressing complex modern issues, from redistribution to regulation, far beyond intellectual property.

ASU's enduring value lies in both its systematic curiosity and in the endless fecundity of its investigative pathways and byways. Nozick's discussion of IP rights makes sense if we read him as embracing a kaleidic vision of moral and political philosophy that involves "stress-testing" our core beliefs and principles against a variety of non-ideal circumstances, epistemic worries, Socratic puzzles, and conceptual paradoxes. Centering the exploratory, experimental, and non-ideal side of Nozick's philosophy allows a different reading of ASU as a repository of experimental, non-ideal philosophy. In my reading, such commitments are at least as central to understanding Nozick's moral and political philosophy as are the beautifully crystallised libertarian principles found in his historical entitlement theory. Without denying Nozick's sincere commitment to the universal appeal of deontological justice, focusing on the fluidities in Nozick's thought points us to a better equilibrium point that can accommodate a more robust and defensible theory of liberty and justice that is responsive to our moral intuitions, empirical data, and reasoned judgements. Whatever the flaws in his particular arguments, Nozick pointed us in the right direction, in his typically charming way, by refusing to get stuck or married to a fixed position, and by thus refusing to guide us that final mile. A path without "final words" was the Socratic path that Nozick, always inquisitive, was led to walk.

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