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Why life-saving drugs should be public goods

Rachana Kamtekar

Omar Swartz (1) presents a number of good arguments in favour of treating the formulae for making human immunodeficiency virus (HIV) and other life-saving drugs as public goods rather than private property: ideas can be shared without being used up; the most effective use of blueprints for life-saving medicine is to provide drugs to sick people; finally, it is clearly unreasonable if 'a person who owns something...can dispose of (or control access to) that [thing]...without regard for others.'

But where, in all of these considerations do we find the claims of those who have devoted their labour, time and resources to the research that goes into developing medicines? Although ideas, once we have them, can be shared without being used up, it can take a lot of money to come up with those ideas in the first place. One estimate (probably on the high end) by the US government is that it takes US$ 500 million to develop a new drug-this presumably factors into the costs of development, the costs of testing drugs, especially on human subjects, and of drug development attempts that fail.

In what follows, I will argue for the same conclusion as Swartz, that life-saving drugs ought to be treated as public goods, specifically addressing what I expect to be the main objections to that conclusion.

The argument from benefit

The usual argument for privatisation of some goods is that it benefits all concerned. For example, it is argued that patents promote innovation by guaranteeing that the incentives innovators have to do research (i.e. profit) is protected, and by enabling innovators to share their knowledge so that others can build on their discoveries or inventions upon payment.

In thinking about whether we should regard life-saving drugs as private or public goods, we need to pay attention to the development of drugs and not just their proper use. People who support privatising, or particular privatising schemes such as patent protection, often argue that without such schemes, there would be no incentives to do new drug research (or to share the results of such research). However, many people do new drug research just because it is their job, and national governments such as the US government or non-governmental agencies such as the World Health Organization (WHO) fund new drug research just because it is needed.

Will people refuse to do research if they do not have the prospect of the riches afforded by patent protection? This seems unlikely since scientists doing research are happy to do so even when the only rewards are their salaries, professional recognition and benefit to humanity. The patents usually go to their corporate employers. Then, will people refuse to fund research if they do not have the prospect of the riches afforded by patent protection? This may be true, but research can be funded by taxes as well and research funded by taxes might be directed towards desperately needed drugs for tuberculosis and malaria rather than Viagra. Still, even if patents are not necessary incentives for research, they might be, on the whole, beneficial to research-for example, by protecting and enabling innovation.

Here it is worth attending to the situational details that can make a scheme which works in theory, but fails in practice. So consider who in the developing world stands to benefit by signing the intellectual property codes set by the developed world (which had no such codes when it was developing). Few developing countries have drug industries at all, and they have to fight expensive legal battles to keep first world drug companies from patenting remedies that have been passed down through folk tradition. Further, as long as drug companies are driven by the need for profit, they have little reason to invest in research to find drugs for diseases prevalent in the developing world, where the buying power is low. Thus, most people in the developing world benefit less from privatised medical research than they would from medical research driven by health needs and funded publicly. We should also ask: 'Who in the developed world benefits from current intellectual property codes?' As the standards for patenting become more precise, it becomes more and more expensive to obtain patents. Some companies are choosing not to make their research public, rather than to patent their findings. Driven by profit, drug companies sometimes make cosmetic alterations in medications to extend their patents. Life-saving medicines can be unaffordable to people in both the developed and developing world-with the consumer paying not only for salaries of chief executive officers and investor returns but also for expensive advertising.

The moral argument

Many people believe that those who have discovered or invented the formulae for manufacturing medicines have a right to those formulae, and not just to compensation for their labour or a return on their investment. John Locke, the classical liberal defender of private property articulated this intuitively powerful idea in his Two Treatises of Government (2) thus: 'Something becomes mine, rather than the common possession of mankind, when I mix my labour with it.' The reasoning seems to be something like, 'My body is my own, so my labour is my own, so the products of my labour are my own.'

However, Locke held that the justification for my appropriating any part of the commons is in the first instance that this is the condition of my benefiting from it. For example, I need to make the fruit I find lying on the ground part of my body to benefit from it; this need is what first justifies my private appropriation of the fruit. Further, when I labour, my labour so increases the value of whatever it is mixed with that I do not, by appropriation, decrease what is available for others instead, I also increase the common stock.

Two consequences of this justification of private property in terms of benefit are that: (i) in cases where appropriation does diminish what is available for others-for instance, in the case of enclosures of the commons in England in Locke's time-Locke opposed appropriation and (ii) if the goods I have appropriated to myself spoil because I am not able to use them, then these goods are no longer serving the purpose of property, which is for the benefit of mankind, individually and collectively.

We can see that Locke did not treat private property as 'a moral and legal right to exercise exclusive influence and control over a material object', come what may. He traced the transgression of the natural limit on appropriation to the invention of money: money makes it possible for one to appropriate more and more to oneself without spoilage and to the detriment of the commons. Under these circumstances, Locke argued, private property is no longer justified by its benefit to mankind, but by a tacit agreement to the property system. If this describes our circumstances, then we may ask: Did we agree to this system of property allocation? What system should we agree to? One that allocates property rights to the 'first' discoverer, or one that spreads the benefits of discoveries and inventions, or some other system?

We need not take Locke's views as authoritative, despite his influence on our thinking about property. I cite them because they are sensible, for they recognise that property allocation arrangements must be justified, either in terms of their benefits to all concerned, or on the basis of some agreement-which had better be fairly made, if it is to justify anything. (In contrast, it looks as though developing countries are being strong-armed into conforming to WTO's codes for trade-related intellectual property rights by 2006.)

Finally, let us consider the position that ownership rights should reside with those whose labour has created a given physical or intellectual product-whatever be the overall social consequence. Note that this position does not support the status quo, since currently corporate entities rather than researchers, usually own patents. However, this position posits an unsupportable relationship between labour and entitlement. Some people argue (following one line of reasoning from Locke but not the others) that if you labour on something, you have a right to that thing, because your labour is the source of its value. However, this is simply false: natural resources are an obvious source of value-the value of wood, for example, does not derive from logging alone, but also from the trees that may have grown up on their own. Labour may add value to things found in nature, but it does not create their value. (Marx's 'labour theory of value' does not say that labour is the source of value, but that a thing's exchange value is determined by the amount of labour it would take to produce that thing-the thing in question can actually have fallen from the sky.) I am not denying that people ought to be compensated for their labour, I am denying that people have a right to what they mix their labour with.

Reflection on these considerations should, I believe, begin to dissolve the hold of the intuition that discoverers and inventors, and 'makers' in general have some right to what they make. They may have the power to share it or not, but that power and right are not the same thing.

References

1. Swartz O. Access to AIDS medicines: ethical considerations. Indian J Med Ethics 2004; 1: 75-6.

2. Locke J. In: Laslett P (ed). Two treatises of government. Cambridrge: Cambridge University Press, 1988.

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