

Access to Medications and the Need for Incentives

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INTRODUCTION

The HIV/AIDS epidemic raises many fundamental questions about the nature and requirements of global justice. It is well known that access to HIV/AIDS medications varies from country to country and that patients in the developed world have preferential access. For patients in the developing world, intellectual property rights can create a barrier to treatment by making the cost of HIV/AIDS medications unaffordable. A philosophical theory of justice ought to provide us with normative foundations to ground policy options. These policy options will help us overcome the barriers intellectual property rights create so that patients worldwide could have fair access to HIV/AIDS medications.

In the first part of this paper, I will discuss the roots and scope of the problem. I will highlight that countries which have the greatest number of individuals living with HIV/AIDS also have the least access to treatment and care services. One of the main reasons individuals do not have access to treatment is because intellectual property rights cause medications to become unaffordable for those who need them the most. In the second part of the paper, I will discuss arguments to support greater access to HIV/AIDS medications. I will focus on John Rawls's theory of justice because it can provide the foundations for discussing the importance of access to HIV/AIDS medications. I will discuss how Thomas Pogge extends Rawls's theory of justice so that it can include global access to HIV/AIDS medications. In order

to achieve global access to HIV/AIDS medications we need to find a way to incentivize pharmaceutical research so that medications that are beneficial for everyone continue to be developed. One way that we currently do this is to provide pharmaceutical companies intellectual property rights for medications. In the third part of the paper, I will articulate some of the reasons given to support intellectual property rights. In the fourth part of the paper, I will provide a way to balance the public health goal of achieving global access to HIV/AIDS medications with intellectual property rights. I argue that at the very least governments should take advantage of the flexibility found in the Trade Related Aspects of Intellectual Property Rights [TRIPS] agreement to increase global access to HIV/AIDS medications. Pharmaceutical companies might argue that the flexibilities in the TRIPS agreement limit the scope and extent of their rights but this limitation is justifiable to achieve the public health goal of global access to HIV/AIDS medications.

PART 1: THE ROOTS AND SCOPE OF THE PROBLEM

The HIV/AIDS epidemic continues to be a major global public health challenge (Joint United Nations Programme on HIV/AIDS 4). There are an estimated 35.3 million people living with HIV/AIDS worldwide (ibid.). Countries in Africa have the greatest number of individuals living with HIV/AIDS but these individuals also have the least access to treatment and care services. HIV treatment coverage in low- and middle-income countries is provided for only 34% of the 28.6 million people eligible for treatment under the 2010 World Health Organization HIV treatment guidelines (6). Ideally, everyone who is eligible for treatment should be receiving it, yet only around 10 million HIV-positive people have access to antiretroviral treatment in low- and middle-income countries (6). Unfortunately, the countries with the highest burden of HIV/AIDS have the least access to HIV/AIDS medications and treatment even though they have the greatest need for it.

Although there has been significant progress in expanding treatment services, key populations often experience major barriers to obtaining treatment and care services (6). The barrier I will focus on is the high prices of patented drugs, which are caused by intellectual property rights. The high price of these patented drugs creates a situation where medications become unaffordable for those who need them the most. There has been a lot of debate and controversy around this issue for quite some time. Pharmaceutical companies do not want their intellectual property rights to be infringed or limited but many others argue that property rights be relaxed for the sake of increasing access to life saving medications. Some argue that intellectual property rights for drugs infringe on human rights and that human rights should take precedence over intellectual property rights. These issues are important for global justice because intellectual property rights benefit those in

developed countries while at the same time greatly disadvantaging those in developing countries due to globalization, the international trade regime, and capitalism. Since societies are interconnected we need to pay attention to the way activities in one country affect the lives of people in other countries to ensure that we maintain a just system.

PART 2: ARGUMENTS TO SUPPORT GREATER ACCESS TO HIV/AIDS MEDICATIONS

In this section, I will focus on Rawls's theory of justice because it can provide the foundations for discussing the importance of global access to HIV/AIDS medications. I will then discuss how Pogge extends Rawls's theory so that it can include global access to HIV/AIDS medications. I believe Pogge provides compelling reasons for supporting greater access to HIV/AIDS medications.

Rawls has developed a political conception of justice called justice as fairness (Rawls, *A Theory of Justice* 183). He argues that this political conception of justice will have two general principles of justice, which would be chosen behind a veil of ignorance by parties in the original position (184). The veil of ignorance is used to ensure that the representatives of citizens do not know their sex, social status, race, and so on in order to avoid bias (Rawls, *Political Liberalism* 25). The representatives will choose between several principles of justice without knowing the socioeconomic status of those they represent (26). They will try to choose the principles of justice that would be most advantageous for those they represent (26). Rawls assumes that behind the veil of ignorance the representatives will choose the following two principles. The first principle, known as the priority of liberty principle, states that everyone will have an equal right to basic liberties compatible with similar basic liberties for others (Rawls, *A Theory of Justice* 185). The second principle, known as the difference principle, states that social and economic inequalities should be arranged so that they are both to the greatest benefit of the least advantaged and that they are attached to positions open to all under conditions of fair equality of opportunity (185). Fair equality of opportunity requires that positions of authority and offices of command are accessible to all (*ibid.*).

If we want to achieve greater global justice, then Rawls's theory must be extended so that it includes global access to HIV/AIDS medications. Global justice is recognized as an issue of great philosophical interest. Many philosophers are writing about global justice such as Martha Nussbaum and Amartya Sen. The situation and prospects of everyone in the world are shaped by one common history (Pogge, *Access to Medicines* 74). This history has been filled with injustices that have given some people advantages in life and others disadvantages (*ibid.*). By achieving greater global justice we will be able to enjoy our advantages while also addressing the disadvantages that others face.

Rawls left aside the problem of justice between nations because he wanted to

focus on the idealized case of a self-contained nation. However, Pogge argues that modern societies are not self-contained and we need to ask how Rawls's theory can apply to the complexities of the real world. Pogge believes that if Rawls's conception of justice is taken seriously, the life prospects of the globally least advantaged will be the primary standard for assessing our social institutions (Pogge, *Rawls and Global Justice* 233). There should be a single global original position which makes use of the veil of ignorance and applies Rawls's two principles of justice to the entire social world (237). The self-contained nation in this scheme will be the world at large. From the perspective of this argument, nationality is merely one more contingency like race which will be hidden behind the veil of ignorance. We can justify our global institutional order only insofar as we can show that no other feasible alternative scheme could produce a better off least advantaged group (238).

In the case of the HIV/AIDS epidemic, those who are most severely affected by the epidemic are the globally least advantaged persons. Africa has the greatest number of people living with HIV/AIDS and these people are the globally least advantaged because they already have bad living conditions which are shaped by political and social instability, poor infrastructure, illiteracy, little education, and insufficient healthcare. If we deny the globally least advantaged persons access to HIV/AIDS medications we will only cause them greater disadvantage since lack of access to medications affects the broader context of HIV/AIDS sufferer's lives (Yamin 342). Without access to medications many people cannot attend work, school or provide for their families (341). Children orphaned and dying because of HIV/AIDS will be denied the possibility of fully developing their own capabilities because they are forced to leave school to earn wages and become caretakers (345). AIDS affected households have more poverty and families have less money to purchase food. By allowing the globally least advantaged persons to have greater access to HIV/AIDS medications we will be ensuring that they will have better life prospects.

PART 3: INCENTIVES FOR PHARMACEUTICAL RESEARCH

If we want to achieve global access to HIV/AIDS medications, we need to provide incentives for pharmaceutical research. One way we currently provide these incentives is to give pharmaceutical companies intellectual property rights for medications. When intellectual property rights are challenged, proponents try to justify them by giving three main reasons for why they are important. In this section, I will articulate all three reasons because I believe we need to address them if we want to continue to benefit from pharmaceutical research.

The first reason is that intellectual property rights recognize and legally affirm the moral intuition that creators and inventors have the right to benefit from the products of their intellectual labor (Werhane and Gorman 596). This reason draws

on the philosophical concept of desert, which is typically affiliated with a non-consequentialist approach to moral reasoning. According to Rawls, we do not deserve our natural talents or our initial endowments because they are given to us by the natural lottery and random luck (Rawls, *A Theory of Justice* 186). However, the concept of desert justifies that we do deserve the fruits of our natural talents when we refine and enhance our natural talents through hard work (Merges 124). The inventor of a drug deserves a property right over it because it is the fruit of their talent and hard work. Desert also explains why inventors deserve property rights over their inventions even though their inventions were created using readily available knowledge. Inventors add their hard work, skills, and expertise to existing knowledge in order to create novel, unobvious, and useful inventions (Merges 124). Society is recognizing desert by giving pharmaceutical companies intellectual property rights.

The second reason given for why intellectual property rights are important is that they encourage and incentivize innovation. This reason draws upon a utilitarian consequentialist approach to moral reasoning, according to which there are instrumental reasons for supporting intellectual property rights such as benefitting society as a whole (Werhane and Gorman 597). Intellectual property rights encourage inventors to make their ideas public by protecting ownership of the idea and allowing the inventor to reap benefits from the idea (596). Pharmaceutical companies claim that without protection of intellectual property rights inventors will be less likely to create new medications because they will not have the incentive of making profits from their ideas (597). Without intellectual property rights there would be less incentive to take risks and there will be fewer breakthroughs for future drugs (598). This will negatively impact society because there will be fewer drugs available to treat, cure, and prevent diseases.

The third reason given for why intellectual property rights are important is that they provide opportunities to recoup research and development costs. This reason also draws upon a utilitarian consequentialist approach to moral reasoning, according to which there are instrumental reasons for supporting intellectual property rights such as benefitting society as a whole (597). Drug development cost estimates vary from around 500 million to more than 2 billion U.S. dollars (Adams and Brantner 427). Pharmaceutical companies claim that intellectual property rights allow them to generate profits that are needed to cover the cost of developing a new drug and the large number of initial attempts that never turn into successful marketable drugs. Pharmaceutical companies claim that if they do not generate money for the research and development of new drugs the incentive to produce new products that are beneficial to society will be greatly reduced (De George 550).

PART 4: THE TRIPS AGREEMENT

So far I have stressed the importance of global access to HIV/AIDS medications and have argued that in order to achieve global access we must provide incentives for pharmaceutical research, which we currently do through intellectual property rights. In this section I will discuss one way to balance the public health goal of global access to HIV/AIDS medications with intellectual property rights. I will argue that at the very least governments should implement policies which take advantage of the flexibilities found in the TRIPS agreement.

The TRIPS agreement is the most comprehensive international agreement on intellectual property rights (Wellington, Doha Declaration). The TRIPS agreement requires World Trade Organization (WTO) members to provide twenty-year patent protection for any inventions provided they are new, involve an inventive step and are capable of industrial application (Wellington, Trade-Related Aspects of Intellectual Property Rights). The Doha Declaration on the TRIPS agreement recognizes the public health problems afflicting many developing countries, especially those resulting from HIV/AIDS (Flanagan and Whiteman 72). Due to this fact, the Doha Declaration affirms the right of WTO member states to interpret and implement TRIPS in ways that support public health goals and in particular access to essential medicines (Wellington, Trade-Related Aspects of Intellectual Property Rights). The TRIPS agreement mandates that countries can infringe patents in public health emergencies or other circumstances of extreme urgency (Schuklenk and Ashcroft 182). Each WTO member has the right to determine what constitutes a national emergency or circumstance of extreme urgency, it being understood that public health crises include those relating to HIV/AIDS. The Doha Declaration gives each WTO member a right to grant compulsory licensing and the freedom to determine the grounds on which such licenses are granted (Flanagan and Whiteman 72). Compulsory licenses allow local manufacturers to produce generic copies of patented HIV/AIDS medications at much lower costs (67).

At the very least governments should implement policies which take advantage of the flexibilities found in the TRIPS agreement to increase global access to HIV/AIDS medications. This option will provide access to HIV/AIDS medications for the globally least advantaged persons and will allow them to have better life prospects. Intellectual property rights will still be protected under normal circumstances to ensure that pharmaceutical companies benefit from the products of their intellectual labor, innovation will still be encouraged and incentivized, and pharmaceutical companies will have an opportunity to recoup their research and development costs.

CONCLUSION

In this paper, I have shown that individuals with the greatest need for HIV/AIDS

medications also have the least access to treatment and care services. I have argued that if we want to achieve greater global justice we need to provide global access to HIV/AIDS medications. I focused on Rawls's theory of justice and discussed how Pogge has extended Rawls's theory to include global access to HIV/AIDS medications. If we want to achieve global access to HIV/AIDS medications we need to provide incentives for pharmaceutical research. One way we currently provide these incentives is to give pharmaceutical companies intellectual property rights for medications. Some of the main reasons intellectual property rights exist are that they allow inventors to benefit from the product of their intellectual labor, they incentivize and encourage innovation, and they allow pharmaceutical companies to recoup research and development costs. If we implement policies that take advantage of the flexibilities found in the TRIPS agreement we can balance the public health goal of global access to HIV/AIDS medications with intellectual property rights.

However, we should ask ourselves if we need intellectual property rights at all. Is there another way for us to allow inventors to benefit from the product of their intellectual labor, incentivize and encourage innovation, and generate money for pharmaceutical research? It would be worthwhile to explore alternative incentives for pharmaceutical research so that we can increase global access to medications while also avoiding the problems associated with the TRIPS agreement and intellectual property rights.

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