3-3-2013

Improving Antibiotic Markets for Long Term Sustainability

Aaron S. Kesselheim

Kevin Outterson

Follow this and additional works at: http://digitalcommons.law.yale.edu/yjhple

Part of the Ethics and Professional Responsibility Commons, and the Health Law Commons

Recommended Citation

Available at: http://digitalcommons.law.yale.edu/yjhple/vol11/iss1/6

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of Health Policy, Law, and Ethics by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Improving Antibiotic Markets for Long Term Sustainability

Aaron S. Kesselheim, M.D., J.D., M.P.H. and Kevin Outterson, J.D., LL.M.

INTRODUCTION ........................................................................................................... 103
I. ANTIBIOTIC RESISTANCE ...................................................................................... 112
II. THE LIMITATIONS OF NEW ANTIBIOTIC DEVELOPMENT ................................... 115
III. EXISTING PARADIGMS TO PROMOTE CONTINUED ANTIBIOTIC EFFECTIVENESS ......................................................................................................................... 122
   A. ANTIBIOTIC CONSERVATION ................................................................. 123
   B. PROPERTY-BASED INCENTIVES ........................................................... 128
      1. PATENT EXTENSIONS ............................................................................. 129
      2. TRANSFERABLE INTELLECTUAL PROPERTY RIGHTS ......................... 132
   C. REIMBURSEMENT INCENTIVES BASED ON MEDICAL NEED ................... 134
   D. REDUCING FINANCIAL HURDLES FOR ANTIBIOTIC INNOVATION .......... 137
      1. ENHANCED BASIC SCIENCE FUNDING ................................................ 138

* From the Division of Pharmacoepidemiology and Pharmacoconomics, Brigham and Women’s Hospital, Harvard Medical School (ASK) and the Boston University School of Law & Boston University School of Public Health (KO). Dr. Kesselheim and Professor Outterson contributed equally to the development and writing of this article. The authors received a grant from Resources for the Future, a non-profit organization supported by the Robert Wood Johnson Foundation. In addition, Professor Outterson is the Co-Principal Investigator and Dr. Kesselheim is a consultant in a Robert Wood Johnson Foundation Public Health Law Research Grant (67136), Studying the Public Health Implications of Antibiotic Drug Regulation. Professor Outterson was also supported by the David Saul Smith Award from Boston University. Dr. Kesselheim is supported by a career development award from the Agency for Healthcare Research & Quality (K08HS18465-01) and a Robert Wood Johnson Foundation Investigator Award in Health Policy Research. Portions of this paper have been presented at the Harvard Law School, the Boston University School of Law, the Harvard School of Public Health, the Center for Global Development, the National Foundation for Infectious Diseases, the Public Health Law Association, and ReACT. We are grateful for comments from many colleagues, including Marc Lipsitch, Brad Spellberg, Ursula Theuretzbacher, William Sage, Stephane Mechoulan, Rachel Nugent, Hellen Gelband, Ramanan Laxminarayan, Maureen O’Rourke, Wendy Gordon, and Thomas Pogge.

Published by Yale Law School Legal Scholarship Repository, 2011
2. ANTIBIOTICS UNDER THE ORPHAN DRUG ACT .............................................139
3. REDUCING THE COSTS OF REGULATION .............................................143
E. SUMMARY ........................................................................................................147

IV. THE ANTIBIOTIC CONSERVATION AND EFFECTIVENESS (ACE) PROGRAM
........................................................................................................................................149
A. VALUE-BASED REIMBURSEMENT OF ANTIBIOTICS ....................................150
B. CONDITIONING REIMBURSEMENT ON MEETING CONSERVATION TARGETS
.................................................................................................................................153
D. LIMITED WAIVERS OF ANTITRUST AND SELF-DEALING LAWS ............157

V. IMPLEMENTATION ISSUES WITH ACE INCENTIVES ..............................159
A. DESIGNING VALUE-BASED REIMBURSEMENT .............................................159
B. THE STRATEGIC ANTIBIOTIC RESERVE .....................................................160
C. OTHER CONSIDERATIONS ..............................................................................161
1. INTELLECTUAL PROPERTY ..............................................................161
2. ACCESS TO GENERIC ANTIBIOTICS .......................................................163
3. PUBLIC INVESTMENT IN ANTIBIOTIC RESEARCH .................................164
4. CROSS-BOUNDARY ANTIBIOTIC MANAGEMENT ISSUES ......................165

CONCLUSION ........................................................................................................167
INTRODUCTION

The widespread introduction of antibiotics was one of the greatest medical accomplishments of the twentieth century, but our success in treating infectious diseases has led to a new public health challenge—the emergence and proliferation of microorganisms resistant to standard antibacterial therapy. Unfortunately, legal and market structures in the United States have created a substantial gap between the private and social value of antibiotics, leading to problematic supply and demand incentives and increasingly resistant infections. Both hospitals and community settings report growing resistance problems.

Multidrug resistant bacteria are a grave public health concern because they put patients at risk for serious illness and possibly death, and they place increased demand on already strained health care resources. Patients with resistant infections can lead to increased inpatient hospital costs, outpatient treatment costs, and long-term care spending. Life in a post-antibiotic era would be remarkably different and less healthy.

Leading academic groups, public health organizations, and governments have recently become more vocal about the problem of drug-resistant infections. The Infectious Diseases Society of America (IDSA) reported that “infections that were once easily curable with antibiotics are becoming difficult, even impossible, to treat, and an increasing number of people are suffering severe

1. We use the term “antibacterial” or “antibiotic” throughout, with full recognition that many of the concepts discussed herein also apply to the broader category of antimicrobial agents. We focus on the narrower category because antivirals and antiretrovirals may present novel resistance and incentive issues that require separate treatment. For example, as discussed below, entry of low-cost, generic antiretrovirals has saved millions of lives in the battle against AIDS, but similar outcomes from generic entry have not been reported in the antibiotic market.


7. See Carl Asche et al., Treatment Costs Associated with Community-Acquired Pneumonia by Community Level of Antimicrobial Resistance, 61 J. ANTIMICROBIAL CHEMOTHERAPY 1162 (2008).


103

Published by Yale Law School Legal Scholarship Repository, 2011
The inevitable rise and spread of resistance will render existing drugs progressively less useful. In the absence of new drugs, this leaves us increasingly at the mercy of infections. We cannot eliminate resistance. We can however slow it down, by using antibiotics only when necessary, and by rigorous infection control and basic hygiene, both informed by thorough surveillance.”

Many groups, including the Center for Global Development,13 the London School of Economics,14 Resources for the Future,15 and the Swedish Presidency of the European Union,16 have recently published reports on global antibiotic resistance. Despite this focused attention, few concrete, affirmative steps have been taken, and the threat of resistance grows.


13. RACHEL NUGENT, EMMA BACK & ALEXANDRA BEITH, CTR. FOR GLOBAL DEV., THE RACE AGAINST DRUG RESISTANCE (2010), available at http://www.cgdev.org/content/publications/detail/1424207. Professor Outterson was a member of the Working Group on Drug Resistance at the Center for Global Development.


We believe that one of the primary contributors to the problem of antibacterial resistance lies in the market for antibiotics, and specifically how markets reimburse for drug development and use in this field. Current legal structures and market incentives unwittingly accelerate resistance in several ways, all rooted in the mismatch between private and social value. First, Medicare and U.S. private payor reimbursement\footnote{While our analysis has broader implications, we draw many of our market examples from the United States.} create certain market incentives without adequate concern for the potential social impact on resistance. For example, for many years, federal reimbursement under Medicare has rewarded hospital-associated infections with additional payments, while failing to reimburse for conservation and infection control. While hospitals have significant non-financial reasons to control hospital-acquired infections, this policy paradoxically rewards bad behavior by paying for hospital infections.\footnote{Kevin Outterson, Germ Shed Management, in \textit{Antibiotic Policies: Controlling Hospital-acquired Infection} (Ian M. Gould & Jos M.N. van der Meer, eds., forthcoming 2011).} Or take the example of infection control, which experts have lauded as an effective public health measure that also conserves antibiotics. Medicare does not have a billing code for infection control practices. Because it is not reimbursed, infection control does not directly generate revenue.

Second, some well-intentioned efforts work at cross-purposes, undermining effectiveness at a population health level. For instance, the patent system helps spur innovation of new drugs, but pending patent expiration may lead antibiotic manufacturers to waste their products by promoting drug use for a broad array of minor clinical conditions rather than trying to assure that their products are limited to the most urgent cases.\footnote{The “patent holder waste” hypothesis posits that the patent holder of an antimicrobial will tend to over-market (and thereby waste) the product as patent expiry approaches, delivering an exhausted antimicrobial to the public domain when generic entry looms. See Eric Kades, \textit{Preserving a Precious Resource: Rationalizing the Use of Antibiotics}, 99 Nw. U. L. Rev. 611, 648-52 (2005). But see Kevin Outterson, \textit{The Legal Ecology of Resistance: The Role of Antibiotic Resistance in Pharmaceutical Innovation}, 31 CARDOZO L. REV. 613 (2010) [hereinafter Legal Ecology of Resistance] (developing the theory of patent holder waste); Kevin Outterson, \textit{The Vanishing Public Domain: Antibiotic Resistance, Pharmaceutical Innovation and Intellectual Property Law}, 67 U. Pitt. L. Rev. 67, 78-80 (2005) [hereinafter Vanishing Public Domain] (critiquing Kades’ approach).} This is a classic example of social value exceeding private value.\footnote{Some policy experts claim that the social value of pharmaceuticals generally exceeds their private value. See, e.g., J.D. Kleinke, \textit{The Price of Progress: Prescription Drugs in the Health Care Market}, 20 Health Aff. 43 (2001). For a contrary example of the private value of information exceeding the social value, see Jack Hirshleifer, \textit{The Private and Social Value of Information and the Reward to Inventive Activity}, 61 Am. Econ. Rev. 561, 565-66 (1971).} Another example of antagonistic incentives involves
antibiotic conservation and infection control programs. These initiatives reduce the inappropriate demand for antibiotics, prevent unnecessary infections, and therefore preserve the drugs for more valuable uses. Society benefits, but drug companies point out that these programs undercut antibiotic sales. Citing the lack of appropriately sized and predictable markets, some drug companies have fled from antibiotic research, despite the significant clinician demands for additional effective therapies. The interactive and dynamic effects among these policy options must be mapped and addressed.

Finally, we must evaluate the cost-effectiveness of potential interventions on a population level. From society’s perspective, the NIH severely underfunds basic research into antibacterial resistance. Private markets are unlikely to pick up the slack in basic antibiotic research because private actors undersupply products with common pool or public goods characteristics. On the other hand, some research programs, such as additional antibiotics for self-resolving minor infections, appear to be privately valuable, but unnecessary at a population level. Some recent proposals could generate private financial gains for companies, though they might be counterproductive or cost-ineffective at the population level. One example is the proposal to grant wild-card patents for antibiotics, rewarding drug companies for antibiotic innovation by granting a longer patent on any other drug in the company’s portfolio. Wildcard patent proposals may cost many billions of dollars, with doubtful social value. Essentially, wildcard patents tax drugs for heart disease to pay for antibiotic research and development. We should not pursue such options without adequately modeling the potential gaps between private and social cost, as well as the opportunity cost.

In previous work, we have described some of the policy options available to promote continued antibiotic effectiveness. Table 1 displays these options graphically, dividing the policy options into eight Sectors. The columns in Table 1 are the two intermediate policy goals: conservation of existing antibiotics and

23. See infra Section III.B for a critique of patent-based incentives for antibiotic development.
the production of new ones. While we have conceptually separated conservation and production into columns, the ultimate policy goal remains continued antibiotic effectiveness. Policymakers will need to balance both conservation and production to achieve that goal over time. The rows represent the four primary legal tools that can be deployed to achieve these goals: property, regulation, contract, and tort. With Table 1, one can see a broad array of policy options, eight Sectors in all.

**TABLE 1: CONCEPTUAL LEGAL APPROACHES TO CONTINUED ANTIBIOTIC EFFECTIVENESS**

<table>
<thead>
<tr>
<th></th>
<th>Conservation</th>
<th>Production</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Property</strong></td>
<td>Patents used as conservation tools to privately constrain demand. (Sector 1)</td>
<td>Patents used as incentives to bring new antibiotics to market. (Sector 2)</td>
</tr>
<tr>
<td><strong>Regulation</strong></td>
<td>Public health infection control and antibiotic stewardship programs regulate demand for antibiotics. (Sector 3)</td>
<td>FDA regulations relaxed to speed approval of new antibiotics. Tax subsidies support R&amp;D. (Sector 4)</td>
</tr>
<tr>
<td><strong>Contract</strong></td>
<td>Prizes, grants, and value-based reimbursement support antibiotic conservation. (Sector 5)</td>
<td>Prizes, grants, and value-based reimbursement support new antibiotic production. (Sector 6)</td>
</tr>
<tr>
<td><strong>Tort</strong></td>
<td>Patients sue for hospital-associated infections, increasing institutional incentives to promote safety through antibiotic conservation. (Sector 7)</td>
<td>Federal law designed to preempt state tort law, waiving drug company tort liability for antibiotics, similar to the national vaccine injury compensation program. (Sector 8)</td>
</tr>
</tbody>
</table>

This Article builds on our previous work by describing in-depth a range of integrated policy solutions that address the problem of antibiotic resistance. Our guiding premise is that society’s primary goal should be continued antibiotic effectiveness on a population level by giving proper incentives to various institutions and actors. We emphasize a balanced approach between production of new products and conservation of existing drugs, mirroring a similar shift that

---

is currently underway in energy policy.

Our approach departs from the conventional wisdom in several ways. Most dramatically, we focus economic incentives for conservation on the drug companies themselves, since we believe they are best positioned to act on superior information, if only their economic incentives were realigned. While supporting conservation incentives for providers and others, our primary contribution to the literature is to ensure that drug companies fully embrace antibiotic conservation. Secondly, we focus our efforts on Sectors 5 and 6 - voluntary contracts whereby governments reward patent owners for managing their resources for long-term public health. Our approach is novel in the legal literature. Legal scholarship on drug development has traditionally focused on property-based tools, especially the production of new drugs through patents (Sector 2).27 With the notable exceptions of work by Eric Kades28 and the “Extending the Cure” project by Ramanan Laxminarayan and Anup Malani,29 legal scholarship has generally overlooked property-based conservation incentives designed to prolong antibiotic effectiveness for existing drugs, as well as other contract-based production incentives.30 Some authors have descriptively catalogued the application of tort law to infections, but without a larger theoretical framework that includes production incentives.31 Other legal scholars have described regulatory tools in Sectors 3 and 4, as well as cultural and

27. See Outterson, supra note 19, at 620.
29. LAXMINARAYAN ET AL., supra note 15.
31. Several authors have described tort-based approaches that would fit in Sector 7 (see Table 1). See, e.g., Jennifer M. Miller, Liability Relating To Contracting Infectious Diseases in Hospitals, 25 J. LEGAL MED. 211 (2004) (finding few effective tort remedies against hospitals and suggesting tort liability against health insurers as the better approach); Pamela Nolan, Unclean Hands: Holding Hospitals Responsible for Hospital-Acquired Infections, 34 COLUM. J. L. & SOC. PROBS. 133 (2000); William M. Sage & David A. Hyman, Combating Antimicrobial Resistance: Regulatory Strategies and Institutional Capacity, 84 TUL. L. REV. 781 (2010); Robert Steinbach, Dirty Business: Legal Prophylaxis for Nosocomial Infections, 97 KY. L.J. 505 (2008) (describing the positive role tort law can have to promote hospital safety against acquired infections). For an example of a related Sector 8 approach, see Lincoln Mayer, Immunity for Immunizations: Tort Liability, Biodefense, and Bioshield II, 59 STAN. L. REV. 1753 (2007).
professional influences on antibiotic prescribing practices.\textsuperscript{32} A recent article by William Sage and David Hyman takes a broader approach, cataloguing many possible regulatory strategies.\textsuperscript{33} The medical literature has often focused on Sector 3 conservation programs in isolation, without adequate analysis of the dynamic effects of multiple interventions and the legal and reimbursement environments. In the United States, most conservation and infection control studies focus on single hospitals, missing the positive externalities generated when multiple institutions cooperate across a region.\textsuperscript{34} Recent proposals to weaken antibiotic clinical trial requirements are Sector 4 initiatives.\textsuperscript{35} In short, legal and medical scholarship has not adequately focused on antibiotic issues in the remaining Sectors, especially contract law (5 and 6)\textsuperscript{36} and the complex interactions between conservation and production.

To remedy this gap in the literature, we offer an overview of medical, legal, and market forces that affect antibiotic production and conservation. Furthermore, we present a novel cluster of integrated solutions, centered in contact law,\textsuperscript{37} which we call the Antibiotic Conservation and Effectiveness (ACE) program. The ACE program emphasizes: (1) value-based reimbursement of antibiotics from public payors such as Medicare and Medicaid, with spillover participation from private payors, in order to improve private markets for antibiotic effectiveness by providing financial incentives to promote continued antibiotic effectiveness; (2) making these payments conditional on meeting realistic public health and conservation goals, including a Strategic Antibiotic Reserve; (3) market-enhancing regulatory changes, including limited waivers of antitrust as well as fraud and abuse laws, to permit market coordination for conservation (supporting efforts in multiple Sectors); and (4) increased public grant support for basic antibiotic research, including both conservation and new production.

\begin{enumerate}
\item See Sage and Hyman, supra note 31, for a discussion on the regulatory institutions relating to antibiotic resistance.
\item See Outterson, supra note 18.
\item \textit{BAD BUGS}, supra note 9; Cecilia H. Burke \& Geoffrey M. Levitt, \textit{A Manufacturer’s Perspective: Recent Challenges in Antibiotic Drug Approval}, 2 UPDATE: FOOD \& DRUG L. REG. \& ED. 12 (2008); Steven J. Projan \& David M. Shlaes, \textit{Antibacterial Drug Discovery: Is It All Downhill From Here?}, 4 CLINICAL MICROBIOLOGY \& INFECTION. 18 (2004).
\item \textit{But see} Sage \& Hyman, supra note 33, at 799-803 (discussing improvements to information and public reporting of nosocomial infections).
\item We treat health insurance reimbursement as a form of contract law, even though the market includes some elements of monopolies and monopsonies, as well as significant government regulation. Similarly, we treat grants as contracts, voluntarily entered into by the parties. Issues of tort law will be saved for another day.
\end{enumerate}
The first element of the ACE program is value-based reimbursement for antibiotics, increasing the private value of these drugs to more closely resemble the social value. Changes in reimbursement can have a remarkable impact on how antibiotics are created and used. For too long, antibiotics have been seen as cheap drugs, when in fact they are valuable exhaustible goods. Improved systems of reimbursement can support usage patterns more in tune with the intrinsic value of these drugs, as well as support the rational development of new ones. Our proposal includes prizes to promote antibiotic innovation as a form of reimbursement. James Love has posited prizes and reimbursement as conflicting choices for antibiotic innovation, but we tend to see them as complementary, so long as prices at the point of care do not increase. In our proposal, the price paid by patients is not directly affected by value-based reimbursement. We focus on how the patent holders are reimbursed by private and public health plans. One mechanism might be a voluntary contract between the federal government and the patent holder, promising a significant financial prize in line with the public health impact of the drug, akin to James Love and Tim Hubbard’s extensive proposals for drug R&D prizes or Thomas Pogge and Aiden Hollis’ Health


http://digitalcommons.law.yale.edu/yjhple/vol11/iss1/6
The second element of the ACE program makes these payments conditional: sponsors obtain enhanced financial rewards only if antibiotic conservation targets are met. With this condition in place, a financial incentive would be created for the first time to manage antibiotics for public health rather than just private gain. This second element is necessarily linked to the first: absent this conditionality, increased reimbursement for antibiotics would simply accelerate the patent holder’s incentives to aggressively sell the drugs. Taken together, our goal is to pay more for fewer pills consumed. For a simplified example, if a company currently sells one-hundred million antibiotic pills for $1 each, their total revenue is $100 million. Under ACE, assume that actual clinical needs with conservation are only fifty million pills. At this point, the company has lost $50 million in decreased unit sales. But if the company meets the conservation targets, an ACE prize of perhaps $150 million will be paid—essentially quadrupling the unit price while halving the unit sales. The companies will profit significantly by achieving public health goals.

This conditionality also offers interesting opportunities for special prizes for a few particularly valuable antibiotics. For example, the United States could create a Strategic Antibiotic Reserve to reward the conservation of important antibiotics. Under the present patent-based system, companies turn a profit only if they sell vast quantities of an antibiotic. For drugs in the Strategic Antibiotic Reserve, companies would be rewarded today for not selling the antibiotic, preserving a precious resource for dire future needs.

Third, the biology of resistance creates unique horizontal and vertical coordination problems, even with perfect information and improved incentives at the individual company level. Overuse of antibiotics can create resistance to other drugs within and beyond their class. If multiple drug companies hold the patents for these drugs, the companies will need to coordinate some of their production and sales to maintain the efficacy of their antibiotics.
market activities for long-term sustainability. For these horizontal coordination activities, limited antitrust waivers will permit efficient market coordination, without some of the monopolistic concerns ordinarily addressed by antitrust law. Limited waivers in other aspects of the law, such as the Stark anti-self-referral legislation, may be required to permit vertical coordination with hospitals, physicians, and other providers in implementing infection control measures.

Finally, public funding through the National Institutes of Health (NIH) and other agencies is necessary because for-profit companies do not invest in certain types of research that are essential for public health, including investments in human infrastructure to build research capacities in infectious diseases.

This Article proceeds in six sections. Section I briefly reviews the medical literature on antibacterial resistance. Section II examines the current state of antibiotic research and development. Section III reviews existing legal paradigms for creating and managing antibiotics. Section IV presents our core proposals, the Antibiotic Conservation and Effectiveness (ACE) program. In Section V, we take up critiques of ACE incentives, including the difficulties in fine-tuning financial and reimbursement incentives and the increased investment necessary to make ACE a reality. One key to this proposal is that the patent system remains unchanged; any alternatives offered are contractual and voluntary at the discretion of the companies. We then offer our conclusions in Section VI. The ACE program is designed to improve antibiotic markets, using government contracts to create a long-term and sustainable balance between the supply and demand for antibiotics. The ACE program will better align private and social values in this important sector. Otherwise, we cannot be certain that effective antibiotics will be available when infections strike.

I. ANTIBIOTIC RESISTANCE

The first commercial use of penicillin in the 1940s signaled the birth of the antibiotic era. Despite the efficacy of these new antibiotics, the medical community observed the emergence and spread of antibiotic-resistant bacteria within a few years of the introduction of penicillin. Microorganisms have been found to exhibit a number of biological adaptations, including natural selection of new mutations and the passage of elements carrying resistance genes between species. Resistant microorganisms pass readily among people, and even more

44. See Mary Barber, Staphylococcal Infection Due to Penicillin-Resistant Strains, 2 BMJ 863, 864 (1947) (noting that the first report of penicillin-resistant staphylococcal infections came shortly after the widespread use of penicillin).
45. See generally Marc Lipsitch & Matthew H. Samore, Antimicrobial Use and Antimicrobial
IMPROVING ANTIBIOTIC MARKETS

readily among the sickest people in hospitals or other health care delivery institutions.\textsuperscript{46} Antibiotic use can also spur infection by clearing commensal species that serve as natural limits on the overgrowth of deadly bacteria such as \textit{Clostridium difficile}.\textsuperscript{47}

Over the past decades, however, we have learned that the way antibiotics are used facilitates the development and spread of resistance.\textsuperscript{48} Sir Alexander Fleming, who shared the Nobel Prize for the discovery of penicillin, first noted the role that antibiotic misuse plays in resistance, reporting, “It is not difficult to make microbes resistant to penicillin in the laboratory by exposing them to concentrations not sufficient to kill them.”\textsuperscript{49} Misuse of antibiotics occurs in a number of ways, including prescription of antibiotics when they are not needed, prescription of the wrong type of antibiotic, and improper use of antibiotics by patients. All of these factors have direct biological ramifications; one model is that as the most susceptible bacteria are killed, microbes that may have developed resistance mutations can flourish in an environment with fewer competitors.\textsuperscript{50}

There is a large literature on factors contributing to the social misuse of antibiotics.\textsuperscript{51} One driver is physicians’ prescribing practices. Studies show that physicians vary broadly in their antibiotic prescription practices,\textsuperscript{52} and may not be aware of or adhere to clinical practice guidelines addressing proper use of antibiotic agents.\textsuperscript{53} For example, studies have shown that generalists and


\textsuperscript{46} See J. Kristie Johnson et al., \textit{The Role of Patient-to-Patient Transmission in the Acquisition of Imipenem-Resistant Pseudomonas Aeruginosa Colonization in the Intensive Care Unit}, 200 J. INFECTIOUS DISEASE 900 (2009).

\textsuperscript{47} See Outterson, \textit{supra} note 18, for a full discussion of the pathogenesis of \textit{Clostridium difficile}.

\textsuperscript{48} See generally Saver, \textit{supra} note 32.


\textsuperscript{50} See Lipstick \& Samore, \textit{supra} note 45, at 349.


\textsuperscript{52} Ethan A. Halm et al., \textit{What Factors Influence Physicians’ Decisions to Switch from Intravenous to Oral Antibiotics for Community-Acquired Pneumonia?}, 16 J. GEN. INTERNAL MED. 599 (2001).

\textsuperscript{53} Galen E. Switzer et al., \textit{Physician Awareness and Self-Reported Use of Local and National Guidelines for Community-Acquired Pneumonia}, 18 J. GEN. INTERNAL MED. 816 (2003).
infectious disease specialists were more likely to prefer newer, broader-spectrum drugs for the treatment of community-acquired pneumonia compared to older, more narrowly tailored agents still recommended by national guidelines. Use of broad-spectrum antibiotic agents in patients whose infections are susceptible to a narrower-spectrum product can promote resistance and ultimately impede management if a more severe multidrug-resistant infection develops that requires the broad-spectrum agent.

Patient behavior also contributes substantially to the development of antibiotic resistance. Patients may demand antibiotic agents in inappropriate clinical situations. Patient demand for antibiotics in the setting of viral or non-infectious diseases can promote resistance, as studies have shown that prescription of multiple courses of the same antibiotic selects for more resistant organisms and clears ecological space for transmission and growth of resistant pathogens. Yet patient demand is a leading predictor of whether physicians provide an antibiotic prescription. In addition, studies have shown that patients are insufficiently aware of the important ramifications of antibiotic overuse in the development of resistance. Patients also may not always adhere to full treatment lengths, which might be better if the prescription was inappropriate in the first instance. For some infections with particularly dangerous public health implications, such as multidrug-resistant tuberculosis, directly observed therapy (DOT) programs have been employed to ensure patient adherence to a full course of treatment.


59. See Coenen et al., supra note 56.

60. See Jodi Vanden Eng et al., Consumer Attitudes and Use of Antibiotics, 9 EMERGING INFECTIOUS DISEASES 1128 (2003); see also Edward A. Belongia et al., Antibiotic Use and Upper Respiratory Infections: A Survey of Knowledge, Attitudes, and Experience in Wisconsin and Minnesota, 34 PREVENTATIVE MED. 346 (2002).


62. A. M. Nyamathi et al., A Randomized Controlled Trial of Two Treatment Programs for Homeless Adults with Latent Tuberculosis Infection, 10 INT’L J. TUBERCULOSIS & LUNG DISEASE

http://digitalcommons.law.yale.edu/yjhple/vol11/iss1/6
IMPROVING ANTIBIOTIC MARKETS

External social pressures also contribute to antibiotic overuse and resistance. Direct-to-physician advertising of antibiotics is one such factor. One study of advertisements related to antibiotics in medical journals showed that these advertisements, in promoting use of their products, rarely mentioned the risk of antibiotic resistance.63 The power of such advertising to affect physician-prescribing practices is well documented and will be discussed in more detail in Section IV below. The example of free antibiotic programs combines elements of physician, patient and social pressures to prescribe. As Li and Laxminarayan have recently shown, free antibiotic programs at large U.S. pharmacies, such as Wal-Mart, influence physician prescribing patterns in statistically significant ways.64 These market forces are barriers to optimal antibiotic use, but are also important potential levers for the proposed ACE Program. If drug companies were properly incentivized for public health goals, their influence and financial resources could be deployed to counteract many of the clinically inappropriate uses described above. At the very least, the companies would no longer have strong financial incentives to oppose public health conservation measures.

II. THE LIMITATIONS OF NEW ANTIBIOTIC DEVELOPMENT

In recent years, infectious disease experts have expressed concern over the diminishing pipeline of additional antibiotics available to manage resistant disease.65 In this Section, we examine the evidence and conclude that new production alone is unlikely to meet clinical needs unless a strong emphasis is also placed on antibiotic conservation.

The Infectious Diseases Society of America (IDSA) has described a consistent decline in the total number of new antibacterial agents approved in the last twenty-five years, and has reported that since 2004, only five systemic agents were actively being developed by the largest pharmaceutical companies.66 This is

775 (2006).


66. David M. Livermore, Has the Era of Untreatable Infections Arrived?, 64 J. ANTIMICROBIAL CHEMOTHERAPY i29 (Supp. 1, 2009) (noting that we may have exhausted all therapeutic options); Brad Spellberg et al., The Epidemic of Antibiotic-Resistant Infections: A Call to Action for the Medical Community from the Infectious Diseases Society of America, 46 CLINICAL INFECTIOUS DISEASES 155, 158 (2008). But see Julian Davies, The Garden of Antimicrobial...
partially a secular trend, especially since 1995, as FDA approvals in general have declined in recent years as well, as shown in Figure 1. Part of the problem lies with drug innovation in general, not antibiotics in particular.

**FIGURE 1: NUMBER OF ANTIBACTERIAL (AB) AND ALL OTHER NEW MOLECULAR ENTITIES (NMEs) APPROVED BY THE FDA, BY YEAR OF APPROVAL**

According to the European Society of Clinical Microbiology and Infectious Diseases (ESCMID), the oxazolidinone class of antibiotics, which includes linezolid (Zyvox), is the only class with a completely novel mode of action that has been developed in the past three decades. This claim, however, depends on how the term “class” is defined and the time period selected for comparison.

---


Since 2000, two new antibiotic classes (or analogues of classes) — ketolides and glycyclines — have been approved that comprise important variations on old classes with improvements in their activity against resistant organisms. The FDA has also approved daptomycin (Cubicin) and quinupristin/dalfopristin (Synercid) in the last decade. Both of these products feature relatively novel mechanisms of action and could be considered new classes in humans, although prior animal use of virginiamycin has potentially affected quinupristin/dalfopristin. Several researchers have suggested that the proper category is not chemical class, but “functional resistance groups,” drugs for which certain species exhibit patterns of cross-resistance. On that basis, the FDA has approved 2-5 new functional resistance groups in the past decade, depending on whether a narrow or expansive definition is used.

A more clinical way to view the success of antibiotic development may be to look at whether we are able to treat patients fighting serious resistant infections. From that perspective, current treatments are improving against some pathogens but worsening against others. An IDSA task force surveyed the literature and identified six particularly dangerous groups of microorganisms displaying increasing resistance rates that pose important threats to patient care: extended-spectrum beta-lactamase (ESBL)-producing Enterobacteriaceae, methicillin-resistant Staphylococcus aureus (MRSA), vancomycin-resistant Enterococcus faecium (VRE), Acinetobacter baumanii, Pseudomonas aeruginosa, and Aspergillus. The IDSA concluded that among these six priority groups of pathogens, many independent industry experts would not consider ketolides and glycyclines as new classes, but as “analogues of existing classes.” Interview with Ursula Theuretzbacher, Founder, Ctr. for Anti-Infective Agents (July 27, 2010) (on file with Kevin Outterson).

70. Many independent industry experts would not consider ketolides and glycyclines as new classes, but as “analogues of existing classes.” Interview with Ursula Theuretzbacher, Founder, Ctr. for Anti-Infective Agents (July 27, 2010) (on file with Kevin Outterson).

71. Telithromycin (Ketek) is a novel derivative of the class of macrolide antibiotics that was designed with side-chain modifications intended to overcome antibiotic resistance to other macrolides. Kimberly D. Clay et al., Severe Hepatotoxicity of Telithromycin: Three Case Reports and Literature Review, 142 ANNALS INTERNAL MED. 415 (2006). Notably, telithromycin was not demonstrated to be more effective than other antibiotics in treating the infectious diseases for which it was indicated. It is also currently available only in oral form, which limits its utility in the sickest of patients with multidrug resistant infections.

72. Tigecycline (Tygacil) is derivative of the class of tetracyclines with microbiological activity against intra-abdominal and skin and soft tissue infections caused by susceptible or multidrug-resistant staphylococci, enterococci, or streptococci as well as most Enterobacteriaceae and anaerobic pathogens. Ethan Rubinstein & David Vaughan, Tigecycline: A Novel Glycylcycline, 65 DRUGS 1317 (2005).

73. Laxminarayan et al., supra note 15, at 20, 40-41; Mossialos, supra note 14, at 7, 113.

74. Livermore, supra note 66.

pathogens, MRSA has the largest current clinical impact and also the largest market for drugs. Not surprisingly, a number of potentially useful MRSA drugs are in late-stage development. The other five priority pathogens with smaller potential markets have fewer new agents in the pipeline, which is not unexpected given market incentives.

The primary reason that pipelines for some priority pathogens can be so small is that for-profit companies with very high revenue expectations have dominated pharmaceutical research and development (R&D). The average funding for pharmaceutical R&D by the National Institutes of Health (NIH) has risen more slowly over time as compared to pharmaceutical manufacturers. More significantly, for-profit companies control approximately 90% of drug-related patents, which often cover underlying research performed in academic institutions supported by public funds. Though these companies have contributed to important progress in development of new medical treatments, they also are beholden to their shareholders. Data from the Securities and Exchange Commission and the Department of Health and Human Services in the late 1990s suggest that the largest pharmaceutical manufacturers invest about one-third of their revenues in sales and general administration (including advertising), another 20% in return to shareholders, and about 15% in R&D in 2000 (industry estimates report 17% in 2009). More recent data suggest that

76. Id.
77. Id.
78. Id.
pharmaceutical manufacturers still spend 31%-50% of sales on marketing. While industry supporters offer slightly different numbers, the essential point is clear: increased sales of pharmaceuticals translate into only a limited increase in R&D after accounting for other expenses and R&D costs bear little relationship to prices. As Professor Scherer notes: “Sunk research-and-development costs are bygones and are therefore irrelevant in current pricing decisions.”

As a result, projected revenue, rather than other factors such as morbidity of a disease or perceived public health need, can become the most important determinant of new drug development. Antibiotics face unique reimbursement challenges in part because of their history of low unit prices, but also because the total unit sales may be smaller than other drug markets. From a financial point of view, drug companies disparage antibiotics as poor sellers due to the short courses of therapy, which limit the ability to earn revenues over a long period of time. “Blockbuster” drugs are usually defined as those producing revenues in excess of a billion dollars per year, but in antibiotics, companies would

(citing 17.4% of total sales into R&D).


87. See R&D Investment by US Biopharma Remains Strong Despite Ongoing Economic Challenges, Reaching a Record $65.3 Billion, THE PHARMA NEWS, Mar. 17, 2010, available at http://www.pharma.org/news/news/rd_investment_us_biopharmaceutical_companies_remains_strong_despite_ongoing_economic_challenges (reporting that the pharmaceutical industry trade group estimates that “the USA’s pharmaceutical research companies have consistently invested around 18% of domestic sales on R&D activities”).


89. As Roin has pointed out, this perspective has a substantial effect on decisions regarding whether to continue to invest in “pipeline” drugs. Companies have preferentially invested in research on products whose intellectual property ownership is clear (or solidly under their control), excluding research on other approaches or agents that could be better suited to address unmet public health needs. Benjamin N. Roin, Unpatentable Drugs and the Standards of Patentability, 87 TEX. L. REV. 503 (2009). But see Kevin Outterson, Death from the Public Domain?, 87 TEXAS L. REV. SEE ALSO 45 (2009), http://www.texaslrev.com/seealso/volume-87/roin/death-from-the-public-domain.html (challenging the example of an unpatentable drug given by Roin).


92. Bruce Booth & Rodney Zemmel, Quest for the Best, 2 NATURE REV. DRUG DISCOVERY.
consider $200 million in annual sales to be a successful market.\textsuperscript{93} And while some large pharmaceutical companies are moving away from the blockbuster drug development model,\textsuperscript{94} manufacturers still focus on diseases that may provide a higher return on investment.\textsuperscript{95} Even when drug companies decide to invest in R&D for antibiotics, they are drawn to the largest markets, such as the multibillion-dollar MRSA market. Large multinational drug companies have not deeply invested in finding drugs for the other five priority pathogens identified by the IDSA.\textsuperscript{96} The ACE program redirects company R&D incentives by instituting value-based reimbursement. Companies will be paid for the health impact of their antibiotic, not the historically weak markets prevalent today.

Other peculiar factors also may disincentivize investment in new antibiotic development by for-profit companies. Increasing resistance makes the antibiotic less effective over time, which might limit the ability of pharmaceutical manufacturers to use standard “life-cycle management” strategies, such as the creation of variant dose or extended-release formulations.\textsuperscript{97} Existing evidence suggests that commercially significant resistance does not occur during the patent term, so this effect may be modest.\textsuperscript{98}

The market for new antibiotic products in the United States and other wealthy countries is limited by public health efforts to prevent infections and restrict the prescription of antibiotics in order to prevent the acceleration of bacterial resistance.\textsuperscript{99} Pharmaceutical companies are concerned that important

\textsuperscript{838, 838 (2003).}
\textsuperscript{93.} Interview with Ursula Theuretzbacher, Founder, Ctr. for Anti-Infective Agents (July 27, 2010) (on file with Kevin Outterson).
\textsuperscript{96.} Fortunately, smaller pharmaceutical companies have taken the lead in research and development where larger manufacturers have stepped out. Andriy Luzzhetskyy et al., \textit{The Future of Natural Products as a Source of New Antibiotics}, 8 \textit{CURRENT OPINION INVESTIGATIVE DRUGS} 608 (2007). For example, daptomycin was shepherded to approval in 2004 by the Boston-based biotech company Cubist seven years after Eli Lilly closed development of the product. Lilly outlicensed daptomycin early in its clinical trials owing to reports of side effects, but Cubist later determined that the side effects were related to suboptimal dosing strength and intervals. John F. Barrett, \textit{Can Biotech Deliver New Antibiotics?}, 8 \textit{CURRENT OPINION IN MICROBIOLOGY} 498 (2005).
\textsuperscript{98.} See \textit{Legal Ecology of Resistance}, supra note 19, at 637-41.
\textsuperscript{99.} See Spellberg et al., \textit{supra} note 65; Spellberg et al., \textit{supra} note 66.
new antibiotic drugs may be subject to aggressive restrictions on use, price controls, and copying by unlicensed generic manufacturers in developing countries. These programs may greatly improve public health, but they reduce the demand for antibiotics and thus shrink the market for the companies that sell them. Antibiotic conservation directly threatens the commercial market for new antibiotics. Similarly, the production of multiple new antibiotics promoted by for-profit companies directly threatens conservation. The ACE program directly addresses this problem by reimbursing for conservation.

Finally, drug companies sometimes claim that antibiotics face uniquely higher research costs that discourage development. For example, critics claim that FDA regulatory requirements have been overly burdensome in the field of infectious diseases, where placebo-controlled studies can be infeasible and alternative study designs, such as non-inferiority studies, can be challenging and costly to organize. While these claims about clinical study designs are plausible, they are not universally accepted. Antibiotic clinical trials are often less expensive than many other types of drug trials because many “predictive animal models [are] available and the late attrition rate due to ineffectiveness is low for antibiotics.” In addition, speeding up antibiotic approvals may increase the risk that antibiotics reach the market with unknown safety risks. In the past three decades, drug companies have withdrawn numerous antibiotics with safety concerns from the U.S. market, more than any other drug class. This is not a record that supports a call for weaker safety standards. Enhanced conservation under ACE will diminish the urge to rush antibiotics through trials prematurely.

In recent years, many groups have suggested proposals to address the problem of serious disease from resistant pathogens. Some proposals focus on reducing demand for antibiotics, for example, through conservation, appropriate

100. Projan, supra note 95, at 428.
106. Id.
108. See supra notes 9-16 and accompanying text.
use, antibiotic stewardship and infection control (see Sector 3 in Table 1).  

Others focus on the supply side (Sectors 2, 4 and 6), generally suggesting additional property rights or financial incentives to encourage for-profit pharmaceutical industry investment in new drug development. The better discussions, in our view, integrate both conservation and production into a coherent policy analysis. In the next Part, we analyze the most prominent conservation and production proposals and consider how they align financial incentives with public health goals. Our proposals borrow from many existing ideas, but integrate them simultaneously to address both conservation and production.

III. EXISTING PARADIGMS TO PROMOTE CONTINUED ANTIBIOTIC EFFECTIVENESS

Proposals to address the growing problem with resistant microorganisms have emerged from a number of different perspectives. In many cases, these proposals come from different academic disciplines, often operating independently of each other. Patent lawyers suggest patent extensions; epidemiologists suggest infection control; clinicians demand new antibiotics; drug companies want to maximize revenue; and regulators suggest new regulations. These disciplines must break their isolation and integrate their perspectives into a comprehensive solution.

First, many researchers have emphasized conservation of currently available antibiotics through strategies such as infection control, as well as limitations on the use of antibiotics to clinically appropriate situations. One institutional champion of this Sector 3 (see Table 1) approach is the Alliance for the Prudent Use of Antibiotics (APUA). Other strategies focus on developing new drugs rather than conservation of existing ones. For example, the IDSA has prominently aligned itself with a call for new financial incentives to support the development of new antibiotic pharmaceutical products. These Sector 2 proposals include additional patent-based exclusivity for sponsors. Some academics and think tanks have suggested non-patent-based incentive proposals, including guaranteed purchase contracts or cash prizes for successful

109. See, for example, the work of the Alliance for the Prudent Use of Antibiotics, supra note 10.
110. See, for example, the report by the Infectious Diseases Society of America, supra note 9.
111. See, e.g., LAXMINARAYAN ET AL., supra note 15; MOSSIALOS ET AL., supra note 14; NUGENT, BACK & BEITH, supra note 13

112. See BAD BUGS, supra note 9. But when IDSA supported legislation in the 111th Congress, the proposed legislation did not include the controversial patent language. See Strategies To Address Antimicrobial Resistance Act, H.R. 2400, 111th Cong. (1st Sess. 2009).
113. See, e.g., LAXMINARAYAN ET AL., supra note 15; MOSSIALOS ET AL., supra note 14;
development of a new antibiotic. These are Sector 6 proposals, focused on contract rather than property rights. The IDSA and others have proposed reducing costs of antibiotic research and development (Sector 4), which can include changing regulatory parameters that guide new drug approval. IDSA has also supported increasing government grants to build the infrastructure and help promote better understanding of basic biology and drug targets (Sector 6). Tort law could also be used, either as a liability threat to promote conservation (Sector 7) or as a shield to promote production of new drugs by preempting state tort law (Sector 8). We will first examine the major existing efforts before we turn to our novel proposals.

A. Antibiotic Conservation

Environmental infection control and programs designed to promote rational use of antibiotics (also called “antibiotic stewardship”) are the primary mechanisms through which antibiotic conservation is currently implemented. Infection control is a public health measure that can help slow the spread of all infections, including particularly virulent or resistant microbes. Examples of infection control mechanisms include tuberculosis testing for healthcare professionals, environmental cleaning, screening of high-risk patients for ARSA, protecting health care workers from tuberculosis: A 10-Year Experience, and hand washing is more important than cleaner wards in controlling MRS.
resistant microbes, and isolating high-risk patients in special rooms or wards.\(^{124}\)

Antibiotic stewardship can involve physician education or active management of physicians’ prescription of antibiotics to encourage the appropriate selection, dosing, route, and duration of therapy.\(^{125}\) The goal is to optimize clinical outcomes while minimizing unintended consequences of antibiotic use like the emergence of resistance.\(^{126}\) Academic detailing programs\(^{127}\) and antibiotic prescription guidelines\(^{128}\) teach physicians about evidence-based prescribing without formal restrictions on their prescribing behaviors. Active management of prescription choices is usually a top-down process organized at the level of the payor or practice organization. The most interventionist programs involve formal restrictions on prescribing and can exclude certain antibiotics from clinical use.\(^{129}\) Other less restrictive types of active management include requiring heightened justification from physicians before prescribing certain antibiotics. Prior authorization requirements, for example, have been shown to change prescribing patterns in other drug classes.\(^{130}\)

Some stewardship tactics, particularly formulary restriction and preauthorization requirements, have demonstrated ability to affect antibiotic resistance rates; one study found that six months after restricting prescribing of vancomycin, colonization by vancomycin-resistant *Enterococcus* (VRE)
IMPROVING ANTIBIOTIC MARKETS

decreased from 47% to 15% in one hospital. Stewardship programs can also be cost-effective for hospitals and health care systems. 

Despite these successes, studies have also shown that stewardship programs are not fully effective against the emergence of antibiotic resistance. Recent systematic reviews concluded that inpatient stewardship programs can reduce antibacterial resistance, but that similar outcomes are much harder to achieve in the outpatient realm. MRSA has been documented to circumvent patient isolation in different rooms or across separated cohort bays. Other stewardship programs, such as educational tools aimed at teaching proper antibiotic use to physicians and disseminating expert-developed clinical guidelines, have varied effects on prescribing practices and have not been shown to have a substantial impact on development of resistance. Formulary restrictions on certain antibiotics have led to over-prescription and increased resistance to other non-restricted antibiotics. Finally, some studies have shown that even rigorous antibiotic restriction practices that result in short-term improvements and slower overall rates of resistance growth have not fully deterred antibiotic resistance. Conservation buys more time, but is only a partial solution.

The scientific literature on stewardship programs thus suggests that certain sensible and well-coordinated programs can be effective against antimicrobial resistance. However, social factors related to the pharmaceutical and health delivery markets have limited the implementation of effective stewardship and

137. Jorge A. Cepeda et al., Isolation of Patients in Single Rooms or Cohorts To Reduce Spread of MRSA in Intensive-Care Units: Prospective Two-Centre Study, 365 LANCET 295 (2005).
infection control strategies. In particular, we have identified two primary ways that the financial incentives of important actors in this market are misaligned.

First, formulary restrictions and preauthorization requirements can be effective stewardship tools, but pharmaceutical manufacturers generally disfavor such measures since they dampen demand for their products. These managed-care techniques restrict access to their products through tiered formularies or as part of step therapy. The industry has fought these restrictions in many ways, including litigation in the highest courts. Since pharmaceutical companies are such powerful institutional actors, any public health program that faces strident drug company opposition will have difficulty succeeding. Our ACE proposals are designed to align private financial incentives with public health goals in a way that makes the drug companies full partners in antibiotic conservation efforts.

Second, hospitals and physicians do not have a billing code for conservation. The lack of both direct reimbursement for infection control and upfront resources to implement stewardship measures effectively have limited infection control measures at hospitals and ambulatory surgical centers. Budgets for infection control continue to tighten—according to recent Medicare guidelines, hospitals will not be reimbursed for the additional costs of treating inpatients who develop urinary or vascular catheter-associated infections, whether or not the infection

141. Pharmacy benefit managers (PBMs), which implement formularies for public and private health insurance plans, are a primary target of manufacturers in this regard. Manufacturers use a combination of rebates and fees to secure more favorable placement on a formulary, including access rebates for placement of products on the PBM formulary and market share rebates for garnering higher market share than established targets. John Carroll, When Success Sours: PBMs Under Scrutiny, MANAGED CARE MAGAZINE, Sept. 2002, available at http://www.managedcaremag.com/archives/0209/0209.pbms.html.

142. For example, state Medicaid programs offer insurance coverage for low-income patients, but in recent years Medicaid programs have struggled with rising spending on pharmaceutical products. When a number of states experimented with formulary restrictions aimed at reducing drug costs, pharmaceutical manufacturers sued to prevent their implementation. The case ultimately reached the Supreme Court, which held that the states’ actions were legal. Pharm. Research & Mfrs. of Am. v. Walsh, 123 U.S. 1855 (2003). The drug industry recently lost a similar case before the European Court of Justice, involving formulary tools in the English National Health System. Case C-62/09, Ass’n of the Brit. Pharm. Indus. v. Med. Healthcare Prod. Regulatory Agency, 2010 E.C.R. (holding that public authorities may offer financial incentives to physicians who prescribe generics and cheaper therapeutic substitutes).

was avoidable.\textsuperscript{144} Increased financial strain on individual institutions and their budgets for infectious disease programs assures that such programs remain chronically underfunded and underperforming. While some studies have claimed that infection control is cost effective, these studies generally compare hospital costs or charges rather than actual reimbursement.\textsuperscript{145} Under Medicare and many private payor reimbursement systems, even these supposedly cost-effective programs probably lose money for the hospital.\textsuperscript{146} Infection control is not a revenue center for U.S. hospitals. The U.S. system offers billions of dollars in tax and patent incentives for new antibiotic production, but virtually no market incentives for conservation. Under the ACE program, providers would be rewarded for conservation, either directly through the Medicare reimbursement system or indirectly from drug companies wanting to achieve their own conservation targets.

Finally, hospitals and other health care institutions have little incentive to cooperate regionally to support infection control. Infections pass between hospitals and long-term care facilities, and between rival institutions as patients and other populations circulate. Just as water pollution control is more effective when managed for the entire watershed, infections should be managed on a public health basis, a concept we call germ shed management.\textsuperscript{147} The Netherlands provides clear evidence that a coordinated approach yields good results.\textsuperscript{148} The ACE program facilitates coordination by giving significant financial incentives to the patent holders who operate globally.

In short, infection control and antibiotic stewardship programs sometimes succeed even in the face of the daunting financial incentives and institutions currently standing in opposition. If maintaining antibiotic effectiveness is a public good, then coordination should be facilitated among actors in a position to implement effective conservation, especially the drug companies and health care providers.\textsuperscript{149} This is where we believe that the ACE program we propose in Part IV can have a significant impact.

\textsuperscript{145} See, e.g., Phillipe Lesprit & Christian Brun-Buisson, \textit{Hospital Antibiotic Stewardship}, 21 \textit{CURRENT OPINION INFECTIOUS DISEASES} 344 (2008) (summarizing a number of studies showing cost savings from antibacterial conservation programs).
\textsuperscript{146} Outterson, \textit{supra} note 18.
\textsuperscript{147} Outterson, \textit{supra} note 18.
\textsuperscript{148} Heiman F. Wertheim et al., \textit{Low Prevalence of Methicillin-Resistant Staphylococcus Aureus (MRSA) at Hospital Admission in the Netherlands: The Value of Search and Destroy and Restrictive Antibiotic Use}, 56 J. HOSPITAL INFECTIONS 321 (2004).
\textsuperscript{149} Benjamin M. Althouse et al., \textit{A Public Choice Framework for Controlling Transmissible and Evolving Diseases}, 107 PNAS 1696, 1699 (2010).
B. Property-Based Incentives

Apart from efforts at infection control and stewardship, some have called for additional patent initiatives intended to increase the supply of antibiotics by encouraging investment in R&D, even though patents as production incentives (Sector 1) are only one of eight possible policy solutions to the problem of antibiotic resistance. The patent system, which provides periods of market exclusivity for drug products, has long been the primary mechanism used to encourage for-profit companies to invest in new drug discovery and development in the pharmaceutical field. Pharmaceutical manufacturers use their market exclusivity period to earn extraordinary revenues on their products. Under the patent system, many important new drug products have been developed and marketed, leading to substantial public health gains, while the research-based pharmaceutical industry has remained a leader in earnings growth and return-on-equity for its shareholders.

However, recent studies have revealed important problematic effects of the patent system incentives on public health, and have even questioned whether this system contributes positively to the U.S. economy. The fixed patent term begins when the patent is filed, usually not long after the initial isolation of a new antibiotic molecule. As a result, manufacturers are incentivized to move their products to market as quickly as possible, and regulatory authorities such as the FDA are pressured to approve products as quickly as possible—both of which can lead to missed signals for emerging safety problems. After marketing

150. See, e.g., BAD BUGS, supra note 9.
151. See Table 1.
152. See supra Table 1.
158. Studies have shown that New Drug Applications approved on an accelerated time frame as artificial regulatory deadlines approach are more likely to have safety problems after they are on the market. See Daniel Carpenter et al., Drug-Review Deadlines and Safety Problems, 358 NEW ENG. J. MED. 1354 (2008); see also Mary K. Olson, Are Novel Drugs More Risky for Patients than Less Novel Drugs?, 23 J. HEALTH ECON. 1135 (2004). Notably, these findings remain controversial.
IMPROVING ANTIBIOTIC MARKETS

approval, the fixed patent term encourages manufacturers to maximize their return on investment by promoting rapid uptake of the product. Drug companies have recently paid hefty fines for promoting drugs for conditions not supported on the drug label approved by the FDA. With the patent clock ticking, companies have a clear incentive to maximize revenues before generic competition appears. Such overuse is financially wasteful and can expose patients to risks of adverse events without providing them with the benefits of the drug. In the case of antibiotics, overuse is potentially even more troublesome, because it can speed the development and spread of antibiotic resistance. One of us has previously characterized this behavior as “patent holder waste” if the patent holder’s overzealous marketing degrades the usefulness of the antibiotic before the patent expires.

With these general comments in mind, we consider a number of different proposals that have been recommended for adjusting the patent-based market exclusivity system to make investment in antibiotic R&D more lucrative to for-profit companies. In large part, we remain critical of these patent-based approaches.

1. Patent Extensions

A number of Sector 2 (patents as production incentives) proposals offer to extend patent or data exclusivity periods for newly approved antibiotics. Patents last for twenty years from the filing date, but due to development and regulatory


163. See, e.g., Legal Ecology of Resistance, supra note 19; Vanishing Public Domain, supra note 19.

164. See Kesselheim & Outterson, supra note 25.

165. See Table 1.

129
approval times, the effective market exclusivity life of a newly approved small-molecule drug is usually on the order of eight to fifteen years. The U.S. Government Accountability Office at one time suggested that patents could be lengthened “to 25 or 30 years” for important drugs with “high therapeutic potential,” which would include certain antibiotic products. An alternative proposal that would accomplish similar goals involves starting the patent or market exclusivity term at the time of FDA regulatory approval, rather than when the patent is filed. Longer market exclusivity terms would provide sponsors with more time in which to earn revenues on their products. A few commentators recommend extremely long patent terms as a production incentive and also as a Sector 1 conservation device. They suggest that excessive use of antibiotics occurs when the owner of the intellectual property rights does not bear the cost of increased resistance in the future. Some of these theorists suggest that if patents’ lengths are increased, it is in the intellectual property owner’s financial interest to maintain low resistance rates so that demand for the product does not diminish over time. This is a variant of the patent holder waste hypothesis, known as the “patent holder conservation” hypothesis.

Patent-based initiatives seek to solve the antibiotic crisis by improving the potential revenues of the manufacturers, but it is unclear whether the financial prospects offered will encourage for-profit manufacturers to re-energize their antibiotic development. Using patents as a demand-rationing device is cumbersome, given the existing health care reimbursement systems in the United States. While companies with existing products will always welcome the financial windfall from a patent extension, the impact on R&D decisions is less

166. Most estimate an effective patent life for small-molecule drugs at around twelve to thirteen years. F. M. Scherer, The Pharmaceutical Industry — Prices and Progress, 351 NEW ENG. J. MED. 927 (2004). Biologic drugs, which do not face competition from follow-on products after patent expiration, have substantially longer effective market exclusivity, even before the recent legislation granting twelve years of data exclusivity.


168. Livermore, supra note 140.

169. See Table 1.

170. Kades, supra note 19.


172. Legal Ecology of Resistance, supra note 19, at 164-165. Neither hypothesis has been empirically tested thus far.

clear. The financial incentive offered by longer patents is likely to be quite modest since the additional funds come from exclusive years at the end of the original exclusivity period, which translates to only a small additional net present value.\textsuperscript{174} Finally, simply lengthening patent terms does not provide manufacturers with an active incentive to change their behavior and delay profit-making. Since future spending on pharmaceutical products is unpredictable, owners of longer patents may choose to maximize revenues in the short term rather than promote conservation of the antibiotic resource.\textsuperscript{175} If there are other manufacturers with antibiotics in the same or related classes, this pressure will be more acute, because bacteria can develop cross-resistance among drugs with similar mechanisms of action.\textsuperscript{176}

We are also concerned about the ancillary effects of extensions in patents. Such initiatives frequently produce unintended consequences, and in order to achieve socially desirable outcomes, careful attention must be paid to the mechanisms employed.\textsuperscript{177} For example, there might be global public health implications for antibiotic patent extensions in the United States, because the patent system on pharmaceutical products has been partially globalized through the World Trade Organization’s Trade-Related Aspects of Intellectual Property (TRIPs) Agreement and the increasingly complex network of TRIPs-plus bilateral and regional trade agreements.\textsuperscript{178} Paul Hunt estimates that the globalized patent system has priced two billion people out of the market for patented medicines.\textsuperscript{179} If applied to the field of antibiotics, a new product might

\textsuperscript{174} Longer Antimicrobial Patents, supra note 24.
\textsuperscript{175} See Longer Antimicrobial Patents, supra note 24; Vanishing Public Domain, supra note 19. However, some theorists suggest the opposite might occur. Horowitz & Moehring, supra note 162; Kades, supra note 19.
\textsuperscript{176} Anna Maria Ferrara, New Fluoroquinolones in Lower Respiratory Tract Infections and Emerging Patterns of Pneumococcal Resistance, 33 INFECTION 106 (2005). Resistance can develop across different classes, which widens the scope of the coordination problem.
\textsuperscript{177} For an example of using substantial financial incentives to achieve a socially desirable outcome that is rife with unanticipated consequences, see Aaron S. Kesselheim, Encouraging Drug Development for Neglected Diseases — The Trouble with FDA Review Vouchers, 359 NEW ENG. J. MED. 1981 (2008).
\textsuperscript{179} See Paul Hunt, Human Rights Guidelines For Pharmaceutical Companies in Relation to
be less available to patients who need it in low-income settings. In addition to the basic health effects, any modifications to U.S. law would have to account for the difficulties inherent in proposing modifications to the global structure. Many would oppose such changes with respect to low- and middle-income countries given this concern that existing intellectual property laws can hinder access to patented drugs. Purportedly global solutions to resistant infections should also address the needs of these countries, where the majority of infectious disease mortality occurs.

ACE incentives can be globalized by simply making the conservation and health impact goals global in focus. This can be achieved in the United States and Europe without regard to the quality of governance institutions in the developing world. The companies have extensive relationships with providers, institutions and governments around the world and would have a financial incentive to use those levers to achieve the public health goals articulated by ACE.

2. Transferable Intellectual Property Rights

“Transferable intellectual property rights” (TIPRs) have been proposed as an alternative to patent extensions. TIPRs, or “wildcard” patent extensions, would be earned upon development of new antibiotic agents and can be transferred to other drugs to extend their market exclusivity periods. In the past, the IDSA has suggested applying them to the field of new antibiotic development. Wildcard patents permit the sponsor to extend market exclusivity for a significant period of time for the most profitable drug in its portfolio, or to sell the right to the highest bidder. Such a market exclusivity extension, if applied to a blockbuster cholesterol-lowering drug such as atorvastatin (Lipitor), whose market exclusivity is due to expire in 2011, could be worth billions of dollars. Advocates of this proposal predicted that if a new antibiotic were developed that fully treated resistant Pseudomonas aeruginosa, and if a two-year wildcard patent were applied to a blockbuster drug, the incentive would achieve cost-
neutrality within ten years.\textsuperscript{183}

There are a number of important public health problems with wildcard patents. The first is cost. Ten wildcard patents have been estimated to cost more than $40 billion.\textsuperscript{184} Even supporters peg the cost of the first wildcard at $7.7 billion.\textsuperscript{185} The opportunity costs of an expenditure of this magnitude must be carefully considered: what other health programs could be underwritten for such a sum? We suggest the ACE program as one alternative.

Second, decoupling of patents from the innovative product is likely to cause hardships for patients taking the drug to which the TIPR is applied.\textsuperscript{186} The emergence of generic drugs and the resulting decrease in cost that occur after patent expiration have been shown to significantly increase access to drugs and adherence by patients to therapeutic regimens.\textsuperscript{187} Wildcard patents change this dynamic by delaying expiration of market exclusivity and derive their value by increasing costs on patients and payors of that other product.\textsuperscript{188} If applied to an essential drug that helps reduce the risk of recurrent cardiovascular disease, a wildcard patent may end up harming millions—a far greater number of patients than a new drug for a rare multidrug-resistant bacterium may help. If companies are permitted to sell their wildcard patents to other manufacturers, public health authorities are unlikely to scrutinize such transfers, which may include concurrent payments or transfers of other intellectual property rights that can further increase costs or limit access to pharmaceutical products. Since changes in U.S. patent law often have global implications, wildcard patents (and patent length extensions) also may extend the waiting time for patients in resource-poor settings seeking access to the product at marginal cost.\textsuperscript{189}

Third, the decoupling of patent rewards from the underlying invention is

\begin{flushleft}
\begin{itemize}
  \item 183. See Brad Spellberg et al., \textit{Societal Costs Versus Savings From Wild-Card Patent Extension Legislation To Spur Critically Needed Antibiotic Development}, 35 \textit{INFECTION} 167 (2007). Notably, this cost estimate assumes that the drug would not have been developed absent the special incentive and ignores the opportunity cost of the proposal.
  \item 184. See \textit{Longer Antimicrobial Patents, supra} note 24, at 561; see also Kapczynski, \textit{supra} note 40, at 265-66; Kevin Outterson, \textit{Antibiotic Resistance and Antibiotic Development – Author’s Reply}, 8 \textit{LANCET INFECTIOUS DISEASES} 212-13 (2008).
  \item 185. Spellberg et al., \textit{supra} note 183.
  \item 186. \textit{Longer Antimicrobial Patents, supra} note 24 (“Wildcard patents would operate as a more than US$40 billion annual tax on heart disease, hypertension, chronic obstructive pulmonary disease, asthma, and depression to inefficiently cross-subsidize antimicrobial research and development.”).
  \item 188. \textit{Longer Antimicrobial Patents, supra} note 24.
  \item 189. \textit{Vanishing Public Domain, supra} note 19. See \textit{supra} discussion in Subsection III.b.1.
\end{itemize}
\end{flushleft}
troubling on constitutional and policy grounds. An important potential constitutional objection maintains the novel, plausible claim that the patents clause requires the exclusion right to apply to the underlying invention. On policy grounds, the intimate connection between the exclusion right and the invention are important to the economic efficiency of the mechanism. The market for the invention itself should determine the value of the patent; likewise, patents on inventions with little utility can be disciplined by a low market return. Decoupling the invention from the reward through the TIPRs mechanism thus unhinges patent exclusions from the key market test of their value, and substitutes an untested administrative process. As Amy Kapczynski noted, “wild-card extensions embrace the most difficult aspect of a prize design without offering the benefits that a prize system could provide.” The ACE program will certainly face prize design issues – discussed below – but the payoff is clear because companies are paid only if public health goals are met.

Despite these concerns, a few members of the pharmaceutical industry consider wildcard patents to be the incentive mechanism “most likely to successfully stimulate new antibiotic development.” Other industry leaders have said privately that they do not support the proposal. Wildcard patents have been considered (and rejected) by Congress as a way of encouraging the creation of countermeasures for bioterrorism agents. At the time of this writing, it appears that the political prospects for applying wildcard patents to the antibiotic market are not great, perhaps in part because their policy and legal obstacles are formidable.

C. Reimbursement Incentives Based on Medical Need

Some proposals to enhance potential revenues for antibiotic drug

190. A “wildcard” patent that gives an inventor market exclusivity in a different product may not meet the language of the Constitution that permits Congress to provide market exclusivity rights in “their respective . . . discoveries.” See U.S. CONST. art. I, § 8, cl. 8. As a counterexample, the pediatric market exclusivity provision applies to drug manufacturers who conduct clinical trials on the use of their products in children and provides six months of additional market exclusivity to that product. See Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (1997). This supplementary exclusivity mechanism is directly connected to the invention in a way that is more consistent with the Constitutional language.

191. TIPRs are really a variant on the prize proposals discussed in Part C below, but with the prize amount based on the value of another, unrelated patent.

192. Kapczynski, supra note 40, at 266.

193. Spellberg et al., supra note 183.

194. Interview by Kevin Outterson with anonymous source.

development work primarily outside the patent system. A fundamental characteristic of market-based reimbursement of patented drugs is that the companies receive revenues based on their ability to sell drugs rather than actual improvement in human health. In countries with insurance coverage for drugs, the market is further disconnected from actual medical need. Where strong government health plans dominate, effective healthcare technology assessment can provide better information to the market. For example, in Australia, England, and Germany, coverage for pharmaceuticals is nearly universal and the government exercises significant control over pharmaceutical reimbursement. But if purchaser market power is fragmented for pharmaceuticals (as in the United States) or if the patients are too poor to be salient consumers (as in low-income countries), then the patent-based system can be significantly disconnected from medical need.

Several prominent proposals tie research incentives directly to medical need. James Love and Tim Hubbard have been leaders in delineating prize-based proposals geared to medical need. Love and Hubbard argue that significant prizes can create incentives for engaging in needed research. The public health payoff comes when the ultimate product is dissociated from its development costs and can enter the public domain immediately. As a result, a plan for distribution of the drug can be undertaken without the revenue-related concerns that can prevent dissemination to lower-income settings. These prize fund proposals could provide financial rewards that increase with the estimated social value of the drug, with the largest rewards going to developers of drugs or vaccines for neglected or undertreated diseases. Though still politically novel, and with a number of logistical and theoretical hurdles to overcome, these proposals have gained increased traction in recent years. In 2005, Vermont legislator Bernie Sanders first proposed a bill setting up an $80 billion prize fund when he was in the U.S. House of Representatives, and he introduced it again in 2007 as a senator. In the 2008 Presidential campaign, candidate John Edwards discussed a prize system alternative to drug patents, and in 2008 a proposal for prize funds was submitted by Bolivia and Barbados to the World Health Organization in response to a request by the Intergovernmental Working Group to develop a sustainable global health plan of action for research into essential medicines.

196. See Love & Hubbard, The Big Idea, supra note 40.
201. WORKING DOCUMENT PROPOSED BY BARBADOS AND BOLIVIA (2008), available at

135
In 2010, the World Health Organization’s governing body kept this issue on the table in the ongoing work of an expert working group on research and development.\textsuperscript{202}

Two other prominent proposals follow similar tracks. Thomas Pogge and Aiden Hollis have proposed a global Health Impact Fund (HIF). The HIF would give companies the option to obtain reimbursement for drugs based on the actual health impact of the drug. The program would be voluntary and contractual, with payments coming from a multi-billion dollar global fund. Payments would be allocated among the qualifying drugs based on the global health impact of the intervention, as measured statistically in Quality-Adjusted Life Years (QALYs) of the target population.\textsuperscript{203} Neglected and undertreated diseases would then have a significant blockbuster market without regard to the wealth or poverty of the patients. Drug companies would also receive financial rewards for marketing to maximize health impact rather than sales. The Health Impact Fund differs from some prize proposals in that it would operate as a complement to the patent system, at the election of the company. As a contract-based legal tool, the Health Impact Fund also falls into Sector 6.\textsuperscript{204} More controversially, the HIF would allow the sponsor to retain their intellectual property. James Love in particular has been critical of this aspect of the Health Impact Fund, as he claims it would undermine generic markets.\textsuperscript{205}

A third variation on this theme is the Advance Market Commitment (AMC), whereby countries, in concert with international aid organizations, commit to purchase a product meeting certain specifications as a production incentive.\textsuperscript{206} AMC supporters argue that providing guaranteed demand can help interested manufacturers budget appropriately in the clinical development process, and can encourage companies to pursue promising late-stage products that might otherwise be abandoned for lack of demand.\textsuperscript{207} In 2007, Canada, Italy, Norway, [Insert Footnotes]


\textsuperscript{203} Thomas Pogge, Human Rights and Global Health: A Research Program, 36 Metaphilosophy 182 (2005); HOLLIS & POGGE, supra note 41; Hollis, An Efficient Reward System, supra note 41.

\textsuperscript{204} See Table 1.


\textsuperscript{206} MICHAEL KREMER & RACHEL GLENNERSTER, STRONG MEDICINE: CREATING INCENTIVES FOR PHARMACEUTICAL RESEARCH ON NEGLECTED DISEASES (2004); Cars et al., supra note 171.

Russia, the United Kingdom, and the Bill & Melinda Gates Foundation modified this strategy by announcing a $1.5 billion AMC for vaccines aimed at pneumococcal pneumonia. This AMC is less ambitious than the original proposal, since almost all of the research and development work had been completed. AMC are also Sector 6 approaches, but must be negotiated piecemeal, with high transaction costs and the opportunity for process capture by drug companies.

All three proposals are readily applicable to the field of antibiotic research, but have limitations that require adjustments. Only the AMC is close to being operational, but the first test is limited to a product nearing the end of development. It has been criticized as resembling little more than a purchase contract for products already launched. Prize proposals face significant financing and implementation barriers. Nevertheless, these proposals may someday shift the current paradigm in global pharmaceutical development, and may be a fruitful area for research and policy articulation. Their application to antibiotics seems especially promising, as any movement towards value-based prizes or reimbursement will dampen company incentives to excessively market antibiotics. The first prong of our ACE program is explicitly an extension of these ideas to antibiotics, by paying prizes or increasing reimbursement to more closely reflect the social need or health impact of the drug. In all three proposals, we would add explicit conditionality, requiring the drug companies to meet antibiotic conservation goals if they are to receive additional funds.

**D. Reducing Financial Hurdles for Antibiotic Innovation**

Patent modifications and prize-based approaches increase the rewards for innovation. Another strategy is to lower the costs of innovation, through grant support for basic science research (Sector 6) and efforts to reduce regulatory hurdles to successful drug product launches (Sector 4). If costs are reduced, then perhaps the supply of new drugs can be increased. The Orphan Drug Act is an example of a legal mechanism to reduce costs to the drug sponsor during

---

209. Id.
210. See Table 1.
211. See Light, *supra* note 40.
214. See Table 1.
development, while also increasing potential revenues after marketing.\textsuperscript{215} As in previous work, we support expanded public support for basic antibiotic research,\textsuperscript{216} but here we also raise questions about any expansion of the Orphan Drug Act. We also review safety concerns with efforts to reduce regulatory standards in antibiotic clinical trials.\textsuperscript{217}

1. Enhanced basic science funding

Basic research funding in infectious diseases\textsuperscript{218} can help to better categorize the biology of infectious diseases and the nature of resistance development and can also establish potential targets for antibiotic products. Such scientific investigation into the mechanisms of resistance can lead to more effective conservation programs.\textsuperscript{219} Current investments are remarkably sparse, with the NIH spending about $200 million per year on antibacterial resistance research.\textsuperscript{220} Admittedly, upstream scientific investigation may take time to be developed into viable antibiotic end-products,\textsuperscript{221} but this way of supporting innovation is still critical, especially given the permanent need for new antibiotic development. Enhanced basic science funding should be an integral complement to any potential programs focused on the downstream drug development process. The funding opportunities provided by the American Recovery and Reinvestment Act

\textsuperscript{215} See infra Subsection III.D.2.
\textsuperscript{216} See Kesselheim & Outterson, supra note 25, at 1692.
\textsuperscript{217} Id. at 1692.
\textsuperscript{218} Though such increased funding could come from any source, the greatest prospect for increased basic research funding comes from public sources. The NIH has maintained a commitment to basic science research over the past few decades, while the pharmaceutical industry has dedicated ever-increasing amounts of its research to later-stage clinical trials. Hamilton Moses III et al., Financial Anatomy of Biomedical Research, 294 JAMA 1333 (2005). Notably, the US is currently the worldwide leader in funding of basic science; the US directs about 6% of its total health care spending to biomedical research, far surpassing all other countries in relative and absolute terms. \textit{Id.}
\textsuperscript{219} Lipsitch & Samore, supra note 45.
\textsuperscript{220} N. Kent Peters et al., The Research Agenda of the National Institute of Allergy and Infectious Diseases for Antimicrobial Resistance, 197 J. INFECTIOUS DISEASE 1087 (2008). The modesty of this funding is striking when compared to the cost of the wild-card patent proposal at $7.7 billion for the first drug: imagine the possibilities if the NIH research budget was quadrupled over the next five years, with sustained funding thereafter.
\textsuperscript{221} Time from identification of receptors or pathways that can serve as the basis for new antibiotic targets to approval of a new product can take a decade or more. However, there is reason for optimism that this process can be accelerated due to recent developments in translational research, including high-throughput screening. Bernhard A. Müller, \textit{Imatinib and Its Successors – How Modern Chemistry Has Changed Drug Development}, 15 CURRENT PHARMACEUTICAL. DESIGN 120 (2009).
of 2009 are welcome steps in the right direction.222

2. Antibiotics under the Orphan Drug Act

Investment can also come in the form of more direct savings to pharmaceutical manufacturers interested in pursuing antibiotics. For example, the Orphan Drug Act (ODA) template includes tax incentives and research grants, both of which decrease the cost to the pharmaceutical company of up-front investment in research and development.223 The ODA could be considered a form of federal cost-sharing for qualifying research projects. Under this legislation, however, the pharmaceutical manufacturer retains full control of the profits of any end product developed with the use of these government funds. In these cases, patients are arguably paying twice for drugs: first through the public funds supporting development of the innovative products, and second through the high prices that orphan drugs command from patients and public payors.224 An


223. The actual cost of drug development is a widely debated figure. Most pharmaceutical industry sources refer to figures from DiMasi, Grabowski, and others, that suggest that the estimate exceeds $800 million in 2004 dollars. See Joseph A. DiMasi et al., The Price of Innovation: New Estimates of Drug Development Costs, 22 J. HEALTH ECON. 151 (2003). Other consultants for the pharmaceutical industry report the value is as high as $1.7 billion for a “blockbuster” drug. See Ashish Singh et al., Healthy Convergence, In Vivo (2004), http://www.bainlab.com/bainweb/publications/publications_detail.asp?id=17177&menu_url=publications_results.asp. But these figures are likely overestimates, particularly for drugs developed with initial investment from public research funding. These values have been criticized for including the cost of capital in their research estimates. See Arnold S. Relman & Marcia Angell, America’s Other Drug Problem, 16 NEW REPUBLIC 27 (2002). Other estimates have suggested the real cost of new drug development averages closer to $240 million. See RUTH RUTTENBERG & ASSOCIATES, INC., NOT TOO COSTLY, AFTER ALL: AN EXAMINATION OF THE INFLATED COST ESTIMATES OF HEALTH, SAFETY, AND ENVIRONMENTAL PROTECTIONS (2004), available at http://www.citizen.org/documents/ACF187.pdf. Still, these remain high figures, with substantial risk involved. Whatever the value, reducing unnecessary costs in drug development remains a worthy goal. See Michael Rawlins, Cutting the Cost of Drug Development?, 3 NATURE REVIEWS DRUG DISCOVERY 360 (2004).

alternative system would seek better public returns on such investment in corporate research, either through limitations on prices from drugs arising from publicly funded research or a requirement that the ultimate manufacturer contribute a share of its revenues on these products to the basic science research commons.\textsuperscript{225} In the ACE program, the conditionality is unrelated to prices or revenues, but linked to public health goals.

The FDA Amendments Act of 2007 set aside financial support for a conference intended to identify whether the incentives contained in the ODA might be extended to certain antibiotics developed to treat “serious and life-threatening infectious diseases, such as diseases due to gram-negative bacteria and other diseases due to antibiotic-resistant bacteria.”\textsuperscript{226} Other groups have made similar recommendations.\textsuperscript{227} The ODA was passed in 1983 to encourage research focused on therapeutic agents for the treatment of rare conditions, for which a limited patient pool could otherwise prevent recovery of the investment made in product development.\textsuperscript{228} It is usually applied to diseases that affect less than two hundred thousand people in the United States, although companies can apply for diseases affecting more than two hundred thousand if they can establish that developing a drug for the condition is uneconomic because there is “no reasonable expectation” that U.S. sales could support development of the drug.\textsuperscript{229} The ODA provides manufacturers with three primary incentives: 1) federal funding of some grants and contracts to perform clinical trials of orphan products; 2) a research tax credit of 50\% of clinical testing costs; and 3) an exclusive right to market the orphan drug for seven years from the date of marketing approval. Through 2010, over three hundred and fifty products with orphan designations have received marketing authorization in the United States.\textsuperscript{230}

\begin{enumerate}
\item is integral to the drug development process. We do not disagree with this point; however, we believe that the role of government-funded basic research is not fully accounted for in these estimates.
\item Kesselheim & Avorn, \textit{supra} note 82.
\item Spellberg et al., \textit{supra} note 183.
\item 21 U.S.C. \S 360ee(b)(2) (2006). Manufacturers rarely use this option because it involves displaying their financial projections and business strategy to regulators and others who might seek to obtain the information through a Freedom of Information Act request.
\item \textit{Food and Drug Administration, List of Orphan Designations and Approvals} (2010), \textit{available at} \url{http://www.fda.gov/orphan/designat/list.htm}; M. Miles Braun et al., \textit{Emergence of Orphan Drugs in the United States: A Quantitative Assessment of the First 25 Years},
Some commentators suggest “extending the Orphan Drug Act to antibiotics,” but the Act already applies to emerging products in this market. While the greatest number of orphan products treats cancer, many target infectious diseases caused by viral and bacterial pathogens. In the first half of 2008, two of the sixty-one new orphan drug designations related to antibiotics. For example, one of the orphan drug designations was granted to Mpex Pharmaceuticals for an IDSA-designated priority pathogen, specifically for the “[t]reatment of pulmonary infections due to {Pseudomonas aeruginosa} and other bacteria in cystic fibrosis patients.” The designation was achieved without new legislation.

Thus, the emphasis on the ODA is curious, and it is unclear how modifying it for antibiotics might be implemented. It should not be necessary to loosen the ODA’s population limits for antibiotics because the two-hundred-thousand-U.S.-person limit is not an absolute barrier. As described above, companies can gain orphan designation for larger groups if they can establish economic necessity. Empirical evidence suggests that this limit has not been a factor in marketing approvals under the ODA generally. The campaign to apply the ODA to antibiotics appears to ignore the history of FDA approvals under the Act.

We also caution against any plan that calls for antibiotic orphan drugs to receive longer than the ODA-designated seven-year exclusivity term. The ODA has been hailed for promoting drug development for rare conditions, but to our knowledge no studies have demonstrated its overall cost-effectiveness. Some designated orphan drugs are used for broader purposes, which belies the rhetoric of orphan drugs. For example, the anemia drug epoetin alfa (Epogen) was originally approved in 1989 as an orphan product for anemia associated with end-stage renal disease, but it has been used for many other indications, such as...
cancer-related anemia, as well as in patients with mildly low red blood cell counts but without symptoms of anemia.\(^{238}\) The manufacturer’s annual revenue for Epogen grew to $1.4 billion by 1996 and continues as a blockbuster more than a decade later,\(^{239}\) with sales exceeding $2.4 billion in 2008.\(^{240}\) Many other products originally protected by the orphan designation are used off-label and provide substantial returns for their sponsor, which calls into question the necessity of the ODA in these circumstances.\(^{241}\) One logical counterargument is that these off-label uses cannot be predicted at the time of drug development, but this misunderstands the relationship between the ODA and drug marketing. Qualifying for ODA status does not commit a company to apply for any particular label, but they will receive the additional incentives only for the specific ODA uses. With new drugs with sufficient patent life remaining, the ODA gives companies an incentive to apply for a narrow use affecting less than two hundred thousand patients per year to obtain the tax credits and grants. When finally approved by the FDA, the company can sell the drug to a much wider group, whether on- or off-label. Facing patent expiry in a few years, companies can take existing popular drugs and look for narrower clinical indications as a new orphan use. This latter group would also include drugs for which the patents have expired: the additional seven years of marketing exclusivity will block sales of rival generic drugs for that use, despite the absence of a valid patent.

Rather than implementing an expansion of orphan market exclusivity for antibiotics, we recommend a thorough and independent review of the cost-effectiveness of the ODA, including an evaluation of possible limits on the current ODA exclusivity term that ends when a new product is used for additional indications and becomes more profitable than anticipated. In particular, any modification of the ODA for antibiotics should be supported by careful empirical evidence of cost-effectiveness of the intervention, including opportunity costs. More fundamentally, an expansion of the ODA to include antibiotics targeting more than two hundred thousand people directly conflicts with conservation goals. The ACE program is designed to be a more carefully


\(^{241}\) This is particularly true of oncology-related drugs. See Paolo G. Casali on behalf of the Executive Committee of ESMO, The Off-Label Use of Drugs in Oncology: A Position Paper by the European Society for Medical Oncology (ESMO), 18 ANNALS ONCOLOGY 1923 (2007).
designed response to the unique needs of the antibiotic market.

3. Reducing the costs of regulation

Before new pharmaceutical products can be legally sold, they must pass approval by the relevant drug regulatory agency. However, representatives of the pharmaceutical industry have attributed the decline in new product development in part to the overly rigorous evaluative process required by the FDA, locating this proposal in Sector 4.242 For most drugs, the FDA allows placebo-controlled trials to support drug approval.243 However, ethics rules would forbid the use of placebos in people with serious infections.244 These studies utilize an active control, generally an approved antibiotic. Such trials are most frequently organized to demonstrate that the experimental antibiotic is not significantly inferior to the standard treatment; the relevant difference is referred to as the “delta.” A non-inferiority trial design can be controversial depending on the

242. See Martin L. Katz et al., Where Have All the Antibiotic Patents Gone?, 24 NATURE BIOTECHNOLOGY 1529 (2006); see also Alexander T. Tabarrok, Assessing the FDA via the Anomaly of Off-Label Prescribing, 5 IND. REV. 25 (2000). This argument was the intellectual underpinning for the Abigail Alliance v. Von Eschenbach case, involving a claim that there was a constitutional right for terminally ill patients to access unapproved prescriptions drugs. Peter D. Jacobson & Wendy E. Parmet, A New Era of Unapproved Drugs: The Case of Abigail Alliance v Von Eschenbach, 297 JAMA 205 (2007). The argument found initial support in a three-member panel in the District of Columbia Court of Appeals before being overturned in an en banc hearing. Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach, 445 F.3d 470 (D.C. Cir. 2006), rev’d en banc, 495 F.3d 695 (D.C. Cir. 2007).

243. The placebo-controlled trial is generally considered to be the gold standard for proving efficacy in clinical trials, but it can have numerous flaws. The FDA has long considered two pivotal placebo-controlled trials as serving as a reasonable basis for a drug approval decision. Alan Davies & Peter D. Stonier, Development of Medicines: Full Development, in TEXTBOOK OF PHARMACEUTICAL MEDICINE 310, 310-31 (5th ed. 2006). It has been criticized because the placebo can be an improper comparator that does not provide any useful information about a drug as compared to other therapies for a particular disease. Jerry Avorn, FDA Standards — Good Enough for Government Work?, 353 NEW ENG. J. MED. 969, 970 (2005).

244. Robert J. Temple, When Are Clinical Trials of a Given Agent vs. Placebo No Longer Appropriate or Feasible?, 18 CONTROLLED CLINICAL TRIALS 613 (1997). Once treatment for a disease has progressed usefully, then it may no longer be reasonable to randomly assign someone in need of therapy to a placebo arm. David Knopman et al., Clinical Research Designs for Emerging Treatments for Alzheimer Disease: Moving Beyond Placebo-Controlled Trials. 55 ARCHIVES OF NEUROLOGY 1425 (1998).

245. Larry L. Laster & Mary F. Johnson, Non-Inferiority Trials: The ‘At Least as Good as’ Criterion, 22 STAT. MED. 187 (2003). The non-inferiority trial, as with other facets of clinical trials, has been the subject of much investigation intended to make it more efficient for drug developers in the antibiotic field. Kem F. Phillips, A New Test of Non-Inferiority for Anti-Infective Trials, 22
level of the delta required by regulators to prove the drug’s utility.\textsuperscript{246} Demonstrating non-inferiority with a low delta in a comparison with an active control means that more patients must be included in a Phase III study of an antibiotic to show a statistically significant difference.\textsuperscript{247} Studies with large numbers of patients are more expensive to conduct.

Regulatory requirements directly relate to clinical trial costs, which are among the largest investments in drug development.\textsuperscript{248} As a result, some commentators have suggested that lower regulatory hurdles may encourage for-profit pharmaceutical manufacturers to return to the field of antibiotics.\textsuperscript{249} Such a move would both decrease the direct costs in premarketing studies and increase the expected returns from longer effective market exclusivity due to shorter regulatory preparation and review times. Norrby and colleagues recommend placing a greater emphasis on studies showing the properties of the drug and allowing extrapolations from data generated in one type of infection to others.\textsuperscript{250} Baquero and colleagues suggest awarding limited marketing authorization based on earlier Phase II studies and beginning the Phase III studies while the antibacterial agent is already available for use.\textsuperscript{251} Livermore contends that historical controls can provide effective comparisons and proposes that approval be extended to related indications (such as infections or types of microbes) based on microbiological data, rather than additional human trials.\textsuperscript{252}

\textsuperscript{246} Norrby et al., \textit{supra} note 68. Recently, pharmaceutical manufacturers have expressed concern that the FDA is tightening the delta and clinical even further by tightening the statistical parameters. David M. Shlaes & Robert C. Moellering Jr., \textit{The United States Food and Drug Administration and the End of Antibiotics}, 34 \textit{Clinical Infectious Diseases} 420 (2002).


\textsuperscript{248} Clinical trial costs are currently the largest driver of drug development costs. According to Moses et al., \textit{supra} note 218, “the proportion of total pharmaceutical research and development expenditures (including those outside the United States) that has gone to clinical trials (phases 1-3) has increased from 28\% in 1994 to 41\% in 2003. In addition, the proportion of research and development funds that has supported phase 4 trials has increased from 5\% in 1994 to 11\% in 2003.” One response from many pharmaceutical manufacturers is to move more clinical trials overseas to countries where patients can be accrued for lower costs. Seth W. Glickman et al., \textit{Ethical and Scientific Implications of the Globalization of Clinical Research}, 360 \textit{New Eng. J. Med.} 816 (2009).

\textsuperscript{249} See Shlaes & Moellering, supra note 246.

\textsuperscript{250} Id.

\textsuperscript{251} Fernando Baquero et al., \textit{Antibiotic Clinical Trials Revisited}, 46 \textit{J. Antimicrobial Chemotherapy} 651 (2000).

\textsuperscript{252} Livermore, \textit{supra} note 140.
Despite these proposals for adjustments to the regulatory process, the effects of such adjustments are far from clear. Approved antibiotics usually have short mean and median clinical development times, as compared to other drug classes. In the United States, the FDA already has programs to speed its regulatory evaluation of important new antibiotics. First, the “fast track” program begins early in the clinical trial process. It is designed to facilitate the development of a New Drug Application (NDA) and expedite the review of drugs to treat serious diseases that fill an unmet medical need. Second, novel antibiotics aimed at multidrug resistant pathogens would also certainly qualify for the FDA “priority review” program, under which the FDA completes its regulatory review within six months after full NDA submission. For example, the antibiotic tigecycline (Tygecil), the first glycylcycline, received the benefit of both the fast track and the priority review systems. The FDA has also taken a number of steps in the last few years to streamline the regulatory process for approval of antibiotics, including publishing guidelines to help manufacturers design trials with less uncertainty about FDA expectations, allowing smaller sample sizes for individual studies, and actively working with sponsors during the early development phase.

There are also important disadvantages to loosening regulatory requirements. Premarketing drug trials can help determine the efficacy of a product, but are often underpowered to detect important adverse effects.
adverse effects only arise after the drug has been approved. However, in a number of recent cases, overly aggressive drug promotion has led many people to receive unnecessary prescriptions for dangerous prescription drug products that were later withdrawn from the market.\textsuperscript{260} The chance that an important safety concern with a product will be missed in pre-approval testing rises as regulatory requirements are lowered.\textsuperscript{261} There may also be risks to speedy regulatory review. Carpenter and colleagues recently showed that approvals of new drugs by the FDA made in the two months before a regulatory deadline were associated with more subsequent safety problems, suggesting negative consequences to imposing such deadlines on FDA drug review.\textsuperscript{262} Any proposal to loosen regulatory requirements, then, must be considered with a critical eye and with an appropriate view of the potential safety risks.\textsuperscript{263} Several of the recently approved antibiotics have demonstrated some important safety issues after marketing approval by the FDA.\textsuperscript{264} In fact, more than half of all antibiotics approved by the U.S. FDA in the two decades following 1980 were subsequently removed from the market, although not all explicitly for safety-related concerns.\textsuperscript{265}

Drug safety is a significant concern, which argues against weakening the antibiotic approval process. For some of the most essential antibiotics, it may be worth taking on these additional risks. At the same time, systems such as active post-marketing surveillance should be in place to assure that a product’s safety is being actively monitored.\textsuperscript{266} Provisional approval of antibiotics for a few years...

\textsuperscript{Disease} (Supp. 3) S176, S177-78 (2008).


261. For example, orphan drugs are nearly all approved on an accelerated basis in small numbers of patients. While such parameters may be reasonable for orphan drugs, because the diseases these drugs treat are only found in small populations of patients, there are clinical implications for permitting accelerated approval based on testing in fewer numbers of patients (both proxies for less stringent pre-marketing regulatory requirements). An early government-led analysis suggested that 31% of orphan drugs on the market had demonstrated more pronounced side effects during pre-approval clinical testing than non-orphan drugs, and following FDA approval, 13% produced more side effects than anticipated. See Susan F. Scharf, Orphan Drugs: The Question of Product Liability, 10 AM. J. LAW & MED. 491, 504-05 (1989).

262. See generally Carpenter et al., supra note 158.

263. See Outterson et al., supra note 104.

264. See Outterson et al., supra note 67.

265. Id. Notably, this risk of subsequent removal from the market presents another limitation to prize funds that reward development of new products upon their approval. Our ACE proposal accounts for the possibility of needing supplemental prizes, but the primary rewards are incremental, as certain public health outcomes are met. Thus, a drug that is later withdrawn for safety reasons would not waste ACE incentive resources.

266. Wendy Brewster et al., Evolving Paradigms in Pharmacovigilance, 1 CURRENT DRUG
under close post-marketing surveillance is a possible compromise position that
dovetails nicely with the ACE incentives described below. More broadly, the
ACE program takes the financial pressure off companies seeking a speedy and
possibly premature approval of an antibiotic. Under ACE, the companies will
also have an incentive to act on their private knowledge of safety and efficacy
issues for the benefit of public health.

E. Summary

The proposals that have been offered to address antibiotic drug development
are limited by concerns related to their implementation (see Table 2). None of
these alternatives sufficiently addresses the underlying trouble with the antibiotic
market: that conservation and innovation incentives might negatively interact. In
the next section, we describe in detail the ACE incentives, a panel of market
changes that can help bring these incentives in better alignment.
### Table 2: Summary of Current Policy Proposals to Address Rising Antibiotic Resistance

<table>
<thead>
<tr>
<th>Policy category</th>
<th>Strategy</th>
<th>Examples</th>
<th>Benefits</th>
<th>Concerns</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conservation</td>
<td>Infection control</td>
<td>Isolation beds, hand-washing, “search and destroy” programs</td>
<td>Most direct tool to limit infection and resistance</td>
<td>May slow but not stop resistance, limited funding, reduces drug company revenues</td>
</tr>
<tr>
<td></td>
<td>Rational antibiotic use</td>
<td>Academic detailing, clinical treatment guidelines, formulary restrictions, prior authorization requirements</td>
<td>Addresses antibiotic misuse, some very successful implementation</td>
<td>Programs are often hospital-specific rather than system-wide, limited funding, reduces drug company revenues</td>
</tr>
<tr>
<td>Property-based incentives</td>
<td>Patent length extension</td>
<td>Start patent at regulatory approval, extend patent term to more than twenty years</td>
<td>Financial costs are indirect, valuable to some drug companies</td>
<td>High costs for patented drugs, non-transparent, rewards the wrong companies, may damage conservation</td>
</tr>
<tr>
<td></td>
<td>Transferable Intellectual Property Rights (TIPRs)</td>
<td>Proposals range from six months to two years</td>
<td>Valuable to large pharmaceutical companies, financial costs are indirect</td>
<td>Transfers costs to other fields, non-transparent, may damage conservation</td>
</tr>
<tr>
<td>Value-based reimbursement</td>
<td>Prizes</td>
<td>Global prize funds, Health Impact Fund, Advance Market Commitments (AMC)</td>
<td>Rewards selected based on public health gains. In some proposals, drug enters public domain</td>
<td>Barriers to implementation and financing, questions about AMC capture by industry</td>
</tr>
</tbody>
</table>
## IMPROVING ANTIBIOTIC MARKETS

<table>
<thead>
<tr>
<th>Reducing drug development costs</th>
<th>Enhanced funding for basic science</th>
<th>National Institutes of Health, private foundations</th>
<th>Develops basic tools and human capital which can lead to new antibiotics and better conservation</th>
<th>No substantial concerns, though funding may take time to achieve results</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Specific development programs</td>
<td>Orphan Drug Act (ODA)</td>
<td>ODA has been credited with producing numerous drugs for rare diseases</td>
<td>Already applies to antibiotic field, cost-effectiveness not known, does not support conservation</td>
</tr>
<tr>
<td></td>
<td>Alters the regulatory review process</td>
<td>Loosen FDA standards, accelerate review time, allow access to drugs before completion of regulatory review</td>
<td>Reduce clinical trial costs, a potential barrier to antibiotic investment</td>
<td>Safety concerns, accelerated resistance from early marketing of new antibiotics</td>
</tr>
</tbody>
</table>

### IV. THE ANTIBIOTIC CONSERVATION AND EFFECTIVENESS (ACE) PROGRAM

The essential concept of the ACE program is to rationalize private incentives more closely to the ultimate public health goals. Our favored legal tool in the ACE program is contract: deploying insurance reimbursement, prizes, and grants for both conservation (Sector 5) and production incentives (Sector 6).267 We articulate the primary objective to be continued antibiotic effectiveness, which requires a balanced pursuit of both conservation and new production. A significant question is which institutions to target with ACE incentives. Ideally, the target would be able to internalize all of the negative costs from antibiotic misuse and the positive benefits from antibiotic conservation. The target should also have ready access to private information about antibiotic use. As we describe below, the drug companies appear to be best positioned to successfully integrate the disparate economic incentives in this field. The companies can act directly to induce conservation and can also influence others (such as doctors and hospitals) to follow suit.

---

267. See Table 1.
The ACE program emphasizes: (1) value-based reimbursement of antibiotics from public payors such as Medicare and Medicaid, with spillover participation from private payors (Sectors 5 and 6). These reimbursement changes will improve private markets for antibiotic effectiveness by giving significant institutional actors financial incentives to promote conservation and continued antibiotic effectiveness: (2) making these payments conditional on meeting realistic public health and conservation goals, including a Strategic Antibiotic Reserve (Sectors 5 and 6), (3) regulatory changes, including limited waivers of antitrust as well as fraud and abuse laws, to permit market coordination for conservation (supporting efforts in multiple Sectors), and (4) increased public grant support for basic antibiotic research, including both conservation and new production (Sectors 5 and 6). In this section, we discuss the details of these proposals in further depth and show how ACE incentives can be instituted without wholesale changes to the current drug approval, patent, and market exclusivity systems.

A. Value-Based Reimbursement of Antibiotics

The first plank of the ACE program is value-based reimbursement for antibiotics. The market undervalues antibiotics. The gross sales of antibiotics in the United States in 2008 were approximately $11.2 billion. Expressed as a percentage of the U.S. pharmaceutical market, antibiotics represent about 3.9% of United States drug sales. Given that low percentage, it is understandable that antibiotics accounted for about 3.6% of all U.S. drug approvals since 2000. Antibiotic innovation is delivering about the number of new drugs that its market size suggests. The market places a modest private value on this important class of drugs and companies respond appropriately. With present

268. See Table 1.
269. See Table 1.
270. This reimbursement could take many forms, including increased ex-manufacturer pricing or prizes awarded under contract. If reimbursement mechanisms were chosen, care would have to be taken to isolate patients and perhaps plan sponsors from the increased costs, perhaps through a reverse rebate directly from the government to the patent holder. If the goal were to minimize changes to insurance reimbursement systems, then a prize system is preferred. Prizes have the disadvantage of requiring separate financing, while reimbursement is built into the health care insurance system.
274. See Outterson et al., supra note 67.
IMPROVING ANTIBIOTIC MARKETS

spending patterns, antibiotics are not in the top fifteen global therapeutic drug classes, ranked by market size.\textsuperscript{275} To demonstrate that the market undervalues antibiotics, we must compare the private value with some other referent. One possibility is the social burden of infectious disease in high-income countries. We calculate this value from the World Health Organization estimates of the disability-adjusted life year (DALY) burden of infectious diseases in various WHO regions. To translate DALYs to dollars, we provide a range of assumptions on the social value of a DALY, assuming that an additional healthy year of life is worth from $50,000 to $125,000 each. Table 3 (below) presents the results, suggesting that the unmet social burden of infectious diseases in the United States and Canada is worth $73-$183 billion per year. Providing $10 billion per year in ACE incentives would still be a terrific bargain for society if it reduced these DALYs by an even greater amount.

\textbf{TABLE 3: UNMET SOCIAL BURDEN OF INFECTIOUS DISEASES IN SELECTED HIGH-INCOME COUNTRIES}\textsuperscript{276}

<table>
<thead>
<tr>
<th>Assumed DALY Value (in ‘000s)</th>
<th>$50</th>
<th>$75</th>
<th>$100</th>
<th>$125</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social cost (US/CAN) (in billions of USD)</td>
<td>$73.3</td>
<td>$110</td>
<td>$146.7</td>
<td>$183.3</td>
</tr>
<tr>
<td>Social cost (High Income Europe) (in billions of USD)</td>
<td>$66.3</td>
<td>$99.5</td>
<td>$132.6</td>
<td>$165.8</td>
</tr>
<tr>
<td>Total social cost (US/CAN &amp; High-Income Europe) (in billions of USD)</td>
<td>$139.6</td>
<td>$209.5</td>
<td>$279.3</td>
<td>$349.5</td>
</tr>
</tbody>
</table>

A second possible referent is the social value of the current health impact of antibiotics. The calculations in Table 3 are limited to the current unmet health


\textsuperscript{276} Underlying burden of disease data from WHO 2008. Estimates by Outterson (2009). These estimates do not include the social value of averted infectious diseases in high-income countries. The cost of resistant infections is a much smaller subset, reaching approximately $30 billion per year in the United States.
need and do not include the current health impact delivered by today’s antibiotic treatments. Life in a post-antibiotic world would be remarkably more dangerous, with profound impacts on human health. If ACE incentives were able to merely preserve the current level of antibiotic effectiveness, this success would be worth tens of billions of dollars, if not more. The estimates in Table 3 might be far too low, underestimating the true social value of antibiotics.

In short, the market as it currently operates places an inappropriately low private value on antibiotics and infection control. The reimbursement price for both should more closely track their social value. But the U.S. health care markets have many dysfunctional aspects; thus some therapies receive too much reimbursement, while others receive too little. Antibiotics have historically been priced relatively cheaply. Whatever the precise cause, a process for refashioning this system must begin with modeling the health impact of new antibiotics and pricing accordingly. For example, if a new drug led to a reduction in length of hospital stay for patients with a certain kind of bacterial pneumonia, a value-based reimbursement plan will return a percentage of these savings to the company. When used in conjunction with the conservation-based exclusivity discussed below, the company’s immediate financial success will be conditioned on the continued effectiveness of the drug. Conversely, as resistance builds on a drug, ACE payments will automatically taper. This approach begins to remedy the mismatch between social value and private value, which we identify as a central problem in antibiotic markets. Make no mistake: we are proposing a very substantial increase in payments for antibiotics, driven by the social value of these important drugs. The total monetary value of ACE incentives might be a net increase of several billion dollars a year in the United States, even as unit sales decline. In fact, declining unit sales would be an expected result as antibiotic conservation techniques received full stakeholder support with financial incentives. Reimbursement for the value provided by infection control and antibiotic stewardship activities undertaken by providers and public health authorities should similarly increase.

Expert groups from a myriad of disciplines have suggested that drugs be reimbursed in accordance with their value to society. In the United States, the

279. Robert A. Steinberg, Easing the Shortage in Adult Primary Care—Is It All About Money?, 360 NEW ENG. J. MED. 2696 (2009).
280. See infra notes 275-287
American Recovery and Reinvestment Act created a federal agency to organize comparative effectiveness studies. The process of modeling the health impact of antibiotics and rating their utility is a logical task for such a body to undertake, with assistance from experts at Medicare and others familiar with large patient databases. The U.S. pharmaceutical industry has been critical of comparative effectiveness research, expecting that total reimbursements will decline and thus undermine innovation incentives. In the specific case of antibiotics, we think these concerns are misplaced, as the purpose of the ACE program is to increase the private value of these drugs to more closely mirror social value.

B. Conditioning Reimbursement on Meeting Conservation Targets

The second leg of the ACE incentive program links these enhanced financial rewards to appropriate use and successful conservation of the antibiotic. In addition to higher prices to the manufacturer (but not the patient), cash prizes can be used as incentives. The key concept here is conditionality, making the enhanced payments only if conservation goals are met at a population level.

Insurance reimbursement and cash prizes are favored over patent extensions and additional marketing exclusivity because they operate directly and immediately with less discounting to present value. Insurance reimbursement and cash prizes significantly change the cash flow stream in all years and substantially alter the net present value of conservation management by the antibiotic sponsor. Unlike traditional R&D pull incentives, the time lag between company action and financial reward could be quite short with ACE reimbursement and prizes. By contrast, patent modifications may be more uncertain from a company’s view since they provide projected rewards,
discounted to net present value, and only if future sales materialize. In addition to being a weaker production incentive, patent modifications do not give strong incentives for conservation.

Unlike other regulatory exclusivity proposals, the ACE program would condition payment to the continued effectiveness of the antibiotic. The sponsor can thus forecast a return on investment from managing antibiotic effectiveness for the long term. This incentive is likely to be much more cost-effective than patent modifications, because the amount of the additional incentive will be conditioned on meeting public health goals. Patents do not employ this condition. ACE incentives could also be tailored to individual drug-bug pairings and various levels of resistance, in order to prevent the antibiotic sponsor from losing financial rewards all at once. For a drug treating MRSA, for example, one target could be working to ensure that morbidity from MRSA in a representative sample of U.S. healthcare institutions remains below a set percentage. This proposal would give the drug companies stronger financial incentives to promote conservation tools in hospitals and otherwise manage antibiotics for population-level public health.

ACE relies on drug companies to rationalize this market characterized by asymmetrical information and irrational economic incentives. Focusing ACE incentives at the pharmaceutical company allows the company to internalize and address the dynamic cross-purposes that characterize existing battles between conservation and new production. One objection is that the company does not fully control the utilization of antibiotics, making ACE incentives a partially effective policy lever. We concede that drug companies cannot achieve conservation alone, but we see value in co-opting these companies to the cause of public health. The companies control the patents, possess significant private information on antibiotic markets, and control significant resources to influence prescription patterns. No other private actor can claim so much. There is substantial empirical evidence that pharmaceutical manufacturers actively direct drug product use through marketing. Pharmaceutical manufacturers devote over $50 billion dollars per year to promotional and advertising practices in the U.S. pharmaceutical market alone. These efforts include direct physician contact

286. See, e.g., Roin, supra note 89.
287. These targets could be designed by a roundtable of experts led by government, but also including representatives from academia, non-profit research groups, and industry. Sensible organizations to lead this target-setting group include the FDA, Centers for Medicare and Medicaid Services (CMS), and the Centers for Disease Control. Models for this type of cooperation and medical evaluation abound at the government level. One example is the Medicare Evidence Development and Coverage Advisory Committee, which provides independent guidance and expert advice to CMS on specific clinical topics.
288. Marc-André Gagnon & Joel Lexchin, The Cost of Pushing Pills: A New Estimate of
IMPROVING ANTIBIOTIC MARKETS

through sales representatives, advertising to consumers and physicians via the media, lay press, and industry publications, provision of free samples of products, distribution of consulting fees or other payments that may act as inducements to prescribers, and development of sponsored Continuing Medical Education conferences touting the benefits of their product that are required of physicians by state medical licensing boards. Studies have shown the impact that these tactics can have on physician prescribing behaviors. Promotional and advertising practices can lead physicians to prescribe more expensive, though less effective, drug products against expert recommendations. This effect has been shown to be especially prevalent among prescribers of antibiotics.

Currently, private financial incentives reward companies for promoting the sales of their antibiotics. As a result, pharmaceutical marketing efforts are exclusively directed towards increasing prescriptions of the company’s antibiotic. Companies can increase the sales of their antibiotic in two primary ways: (1) increase the overall sales of antibiotics (grow the market); or (2) shift demand to their drug from a rival drug (increase market share). Growing the market produces positive externalities for other antibiotic manufacturers, as the benefits from a growing market may spill over to rival producers. Growing the market also produces unclear health effects. If the additional use is not clinically rational, growing the market creates negative public health externalities through resistance. Antibiotic conservation directly threatens the market growth model.

The second strategy entails several different characteristics. Increasing market share is positive for the company (additional sales, with fixed costs spread over a larger revenue base) and directly negative to rivals, who lose sales in a zero-sum game. Shifting market share from one drug to another may also have unclear health effects. If the better drug gains more market share, health should be positively impacted. The opposite is also possible: a company may convince physicians to prescribe and patients to take a less effective drug. Market shifts with negative public health externalities are perhaps more likely when the older, more effective drug is generic and lacks a company champion with a large marketing budget to defend market share. Many of these questions are empirical, and the companies themselves control much of the relevant data. We emphasize that rational policy making in drug innovation will be difficult without either the cooperation of the companies or careful empirical analysis of the data they control. Under the ACE program, the companies will have significant financial

---

290. Avorn, supra note 161.
incentives to use their private information and marketing resources for the benefit of public health goals.

The companies may also be formidable opponents to new conservation programs. In recent years, a number of pharmaceutical manufacturers have been cited for aggressive over-promotion of their drugs. The efforts to encourage rational prescribing and develop evidence-based prescription guidelines have been limited because the investment in these public health efforts has been dwarfed by the pharmaceutical industry’s investment in marketing, which is not necessarily aligned with public health goals. Under the ACE program, pharmaceutical industry promotional practices (such as physician detailing by pharmaceutical sales representatives and Continuing Medical Education) would be refocused for a purpose more in line with public health needs. The ACE incentives would encourage drug companies to target clinically rational use of their products in patients where the drugs would reduce morbidity, while at the same time encouraging the sponsor to restrict resistance-inducing overuse of the product. Industry promotional practices would also be incentivized to encourage efforts aimed at promoting rational prescribing practices and infection control. For example, manufacturers might consider cooperating with hospitals in restricting formularies, rather than seeking agreements or other mechanisms to undermine the practice. The pharmaceutical industry marketing departments possess remarkable tools to influence physician prescribing practices. Under the ACE program, they would be turned into a mechanism for helping encourage proper use, not overuse, of new antibiotic agents. The government selects the public health goals, then the companies privately manage the process to achieve those goals.

Other levels of the market could be considered for ACE incentives, such as the physician, the hospital, or the patient. By choosing the company, we deliver the incentive to the most powerful upstream player in the system, which then can deploy portions of that prize downstream, as they deem most effective. A drug company receiving a $100 million ACE incentive might find it cost effective to offer grants to hospitals with particular infection control problems, to the extent that such an effort helps the company continue to meet its


295. These payments may require exemptions from fraud and abuse laws and antitrust laws. See discussion *infra* Section IV.C.
ACE goals. Giving conservation incentives merely to doctors and hospitals, for example, pits them against the pharmaceutical marketing machine and fails to tap into the companies' vast market knowledge. We suggest financial support (i.e., a billing code for infection control) to both providers and drug companies to support antibiotic conservation, promoting cooperation in the effort.

D. Limited Waivers of Antitrust and Self-Dealing Laws

Our final proposal addresses horizontal and vertical coordination problems in antibiotic markets. The biology of resistance does not respect the lines drawn by patents or antitrust law. Antibiotic resistance can cross multiple species and diminish the effectiveness of antibiotics both within classes and across classes. Resistance patterns are heterogeneous, which complicates conservation efforts. Some private antibiotic conservation strategies would function better if manufacturers could cooperate horizontally in limiting the marketing, sale, and utilization of antibiotics with cross-resistance issues. For example, only two firms currently hold patents on commercially significant FDA-approved drugs in the fluoroquinolone class of antibiotics, but resistance to these drugs can easily affect other drugs in this class. The class itself should be understood as a form of commons, at least with respect to resistance. If the number of players was too large or transaction costs too high, perhaps regulation would be appropriate. The other option is private group coordination, which could be effective in this case given the relatively small number of sophisticated actors. If fluoroquinolones are to be managed for long-term public health, all of the relevant patent holders must work together to jointly manage the market. The patent owners (pharmaceutical companies) must work together to conserve antibiotics.

Competition law appears to forbid exactly this form of joint coordination among competitors. The pharmaceutical industry has received significant attention from competition authorities with regard to its patent and litigation settlement practices. In this circumstance, however, economic models of drug

296. ACE does not require the companies to disclose their private market information. The companies manage their actions as they see fit, in order to obtain the ACE incentives.
297. See Vanishing Public Domain, supra note 19, at 96-97.
300. BUREAU OF COMPETITION, AGREEMENTS FILED WITH THE FEDERAL TRADE COMMISSION UNDER THE MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003:
resistance suggest “a mixed competition/monopoly regime can perform better than competition or monopoly alone.” Likewise, hospitals and payors in a community might improve the public health by coordinating conservation activities on specific pathogens across all hospitals and payors, but might be reticent to do so given the possible sanction of antitrust laws. There are indications that authorities could be favorably disposed to such coordination. The U.S. Federal Trade Commission and Department of Justice have issued joint guidelines suggesting health care joint ventures that would otherwise be anticompetitive might be permitted in narrow circumstances. Proper circumstances include clinical coordination to improve quality, which is the goal of antibiotic conservation.

Therefore, our third ACE proposal creates limited conservation-based antitrust waivers. We propose that the FDA identify particular bug-drug pairings for which cross-resistance is a problem. The IDSA has clearly identified pathogens of special concern in the United States because limited therapeutic options remain. These pairings might be an appropriate starting point. The FDA would be empowered to issue certificates, in consultation with the antitrust enforcement agencies that would permit limited joint coordination of conservation activities for the specified product markets. The concept we are proposing is akin to structure of the safe harbor exceptions to the Anti-Kickback statute, which lists a number of activities that are systematically excluded from federal prosecution. In this case, the certificates would signal to private actors that joint coordination for antibiotic conservation was clearly encouraged, while limiting the potential for collusive mischief by specifying the qualifying drug-bug combinations. In this vein, we also support extending marketing exclusivity to the companies, again conditioned on meeting conservation targets. So long as firms are successfully managing the resource for long-term public health, they should be allowed to continue without the threat of generic entry in the antibiotic market. Generic entry adds another actor to the group that must coordinate activities, complicating efforts. If a company fails to meet the conservation goals, it might be appropriate to place the exclusive marketing rights into the hands of the government or another firm better poised to manage the resource.

Limited antitrust waivers will create a forum for possibly collusive discussions well beyond these particular antibiotics. Perhaps the meetings should


301. Mechoulan, supra note 171, at 4.


http://digitalcommons.law.yale.edu/yjhple/vol11/iss1/6
be public, to facilitate coordination amongst the downstream actors as well. In any event, the industry does not lack other opportunities for market discussions, and if collusion occurs in other drug markets it can hardly be blamed on the ACE program.

In addition to this horizontal coordination problem, drug companies will also want to incentivize their downstream stakeholders to cooperate in their antibiotic conservation efforts. As a result, we predict that drug companies will more readily support vertical antibiotic conservation efforts in hospitals and physician offices, because the success of these programs will most directly determine the extent of antibiotic resistance development—and continued revenue generation for the sponsor. Likewise, hospitals and independent long-term care facilities share patient populations that could benefit from a coordinated effort against resistance. The self-dealing laws, including Stark II, prohibit many forms of financial relationship amongst referral sources. It may be necessary to create specific safe harbors and exceptions to permit vertical coordination of antibiotic conservation efforts.

V. IMPLEMENTATION ISSUES WITH ACE INCENTIVES

A. Designing Value-Based Reimbursement

ACE incentives need not be uniform. A powerful new antibiotic should receive a greater reward; me-too antibiotics with minimal value and doubtful safety profiles should perhaps receive nothing at all, or even be penalized. ACE incentives should respond to the health impact of the drug. This will be a difficult task, with many technical obstacles and the ever-present threat of industry capture. Any pay-for-performance or value-based reimbursement system shares these risks. We address them only briefly here.

Building on the work of the IDSA task force, teams of infectious disease specialists, in consultation with government and international public health experts, should establish targets for ACE incentives that consist of microbes with emerging resistance to current therapy and/or substantial public health impact. Expert groups should then attempt to identify the size of the potential market and health impact for the needed antibiotic in each case by working with government officials, representatives from the pharmaceutical or biotech industries, and health economists. Factors related to the disease target, such as its morbidity, effectiveness of current treatment strategies, and rate of emerging resistance, can be used to identify the upper and lower bounds of the public health goals and

304. See Outterson, supra note 18.
therefore the ACE incentive. Development-related factors, such as the ease of pharmacological research and rapidity of natural selection at the level of microbe, will affect the costs of development and pretrial testing.

The population health goals for any new agent should be flexible, taking into account the dynamics of the health care system as well as the characteristics of the target microbe. A new agent against VRE may find a much easier implementation strategy in acute care settings in developed countries, where VRE is most prevalent. Using this strategy will require additional investment in improved surveillance of antibiotic use and development of resistance. At timely intervals, the same infectious disease experts and public health officials who set the ACE incentive targets will judge the success of the product in treating the infectious disease for which it was approved.

Value-based reimbursement will also need to consider the structure of licensing agreements in the industry, which typically pay royalties based on sales during the patent term. ACE incentives should be considered sales for these purposes, at least as a default rule. For many antibiotics, the company marketing the product did not invent the molecule but acquired it through a license agreement from an inventor based at a university, non-profit research center (such as an academic medical center), or university-affiliated start-up biotechnology company. Some of the payments under ACE may not be included in the royalty calculations under some license agreements, which would be a windfall to the marketer and a loss to the original innovator. The companies will have to amend their licenses, or perhaps a default rule could be integrated into the structure of the ACE contract itself.

Finally, it should be noted that since the private value of antibiotics is such a small fraction of the social value, the amount of the value-based reimbursement system does not have to be finely tuned at first. As described above, the social value of antibiotics appears to be an order of magnitude higher than their private value. So long as clinically important conservation targets are set and the amount of ACE incentives are in the range of several billion dollars per year, we can expect that the resulting expenses will be well spent. The program may well be cost-effective within the health insurance sector alone, without even considering broader positive externalities.

B. The Strategic Antibiotic Reserve

Limited periods of exclusivity, combined with value-based reimbursement, may not provide a reasonable potential market for some clinically important antibiotics. For example, a first-in-class antibiotic might need to be held in reserve for many years, and used only in the most urgent cases. We call this
concept the Strategic Antibiotic Reserve (SAR). 306 The clinical value of the SAR has already been demonstrated with the natural history of vancomycin, a drug that was inadvertently held in reserve for decades and is now a major antibiotic in helping manage MRSA and other extremely potent microbes. 307

Holding a first-in-class antibiotic in reserve might be the right answer for public health, but it will be a financial disaster for the company, especially if the unit sales are quite small. It will be difficult for value-based reimbursement to deliver hundreds of millions of dollars in annual sales for several years of very sparing use. If the social value of holding a new class of antibiotic in the SAR is, to assume an example, $200 million per year, it seems unwieldy to charge $1 million each to two hundred patients (or to their insurers). Neither will longer periods of marketing exclusivity help much, since drugs in the SAR are by definition used only in extreme need and therefore the future projected sales revenue will be deeply discounted. The net present value of additional years of exclusivity after the patent term may be quite small.

For this reason, the ACE program includes supplemental cash prizes for placing important new antibiotics in the Strategic Antibiotic Reserve. These amounts must be quite substantial in order to properly align incentives, ranging towards a billion dollars per year for an important drug class. Current candidates might include daptomycin, a recent antibiotic with activity against MRSA. An expert advisory committee should make the designation of which antibiotics are worth reserving in this way. The financial arrangement with the company will be entirely voluntary, based on a contract with the government. The amount of the payment should be value-based as described above to promote both innovation and conservation. If a company tried to hold out with a critically important antibiotic, of course the government would retain the ability to use a compulsory license, with payment of just compensation for the taking. 308

C. Other Considerations

1. Intellectual Property

The ACE program does not replace the current patent-based exclusivity regime. Antibiotic patents are left in the hands of the companies. One exception to retaining patent rights might be the Strategic Antibiotic Reserve. For these drugs, an alternative model might be a voluntary government purchase of the

307. See Legal Ecology of Resistance, supra note 19, at 656.
A patent buyout would eliminate the company’s uncertainty as to the future value of the patent by setting a mutually agreed price. However, we see advantages to keeping the patent in the hands of the companies, even for a drug in the Strategic Antibiotic Reserve. A key goal of the ACE incentives is to co-opt the companies by giving them a continuing financial incentive to develop and sell antibiotics in line with public health needs. If a patent buyout severs that ongoing financial risk/reward to the company, then that incentive is lost. This is especially troublesome in the case where a company then markets follow-on drugs in the same functional resistance group, because the use of these drugs would reduce the strategic value of the previously-purchased antibiotic.

It should be noted that we are limiting this discussion to antibiotics. Generic access to cheap antibiotics is not entirely positive for public health, even on a merely static basis. Cheap (or free) antibiotics drive resistance and reinforce the overall low reimbursement levels in this drug class. For other classes of antimicrobials, a different balance might be struck between patent law and generic access. Consider antiretrovirals (ARVs) used to treat AIDS. The reimbursed price for first-line treatment in the United States is very high, over $10,000 per year, while the generic price in aid programs in sub-Saharan Africa is less than $100. This huge pricing differential was a keystone in ramping up treatment for millions of impoverished AIDS patients. This model was triggered by unlicensed generics produced by Indian generic companies. For these ARVs, public health demanded quicker access to generics.

We have formulated the ACE program as voluntary, based in contract. New drug sponsors will have a choice of whether to enroll their patent-protected antibiotic in the ACE program. A voluntary system may be more palatable to pharmaceutical manufacturers because it is a less extreme step and gives them a veto. However, a voluntary arrangement is complicated by a number of logistical issues that might undermine the effectiveness of the ACE program. First, it would be difficult to incentivize adherence to ACE guidelines if a manufacturer were to refuse to participate and marketed their drug in a way that damaged other antibiotics through resistance. It might be necessary to control a rogue manufacturer through FDA restrictions on the sale and use of their product. Second, it would be complicated to manage the ACE system if it were to include

310. See supra note 38 and accompanying text.
311. Outterson, supra note 154.
IMPROVING ANTIBIOTIC MARKETS

some new antibiotics but not others. For example, the system may experience administrative difficulties if it attempted to limit value-based reimbursement to only selected antibiotics. It might be difficult to specify causal relationships in cross-drug resistance within and between classes. Similarly, limited waivers of antitrust law may be more difficult to manage if the owners of some antibiotics in a particular class were outside the regulatory framework. Most of these problems will wane as more companies participate and also as we develop better understandings of the underlying biological relationships in resistance through public investment in basic research.

These issues may not be a realistic problem if the value-based reimbursement system was quite robust and generous. Hopefully, the companies will be eager to see increases in the reimbursement level for this class of drugs. Alternatively, the government also retains the power of eminent domain, with the condition of paying just compensation.\textsuperscript{313} Governments also have monopoly power as a purchaser. This is effectively the current market situation in countries where government payors dominate the pharmaceutical market, including the European Union, Canada, and Australia.\textsuperscript{314} Even in the United States, the role of government payors looms larger after the recent expansions in Medicare Part D and Medicaid.\textsuperscript{315}

2. Access to Generic Antibiotics

Under ACE, prices to the patient will not change. From a health plan and social perspective, an expensive but effective antibiotic that meets a public health need is preferable to a low cost but ineffective one, particularly in a country with an adequate social insurance scheme for drugs. We recognize the significant impact of high drug prices in low- and middle-income countries, which calls for full exploitation of TRIPs flexibilities and differential pricing to equitably balance access needs.\textsuperscript{316} It may not be necessary to affect the pricing in

\textsuperscript{313} See Aaron S. Kesselheim & Jerry Avorn, Biomedical Patents and the Public’s Health: Is There a Role For Eminent Domain?, 295 JAMA 434 (2006).
\textsuperscript{315} Kevin Outterson & Aaron Kesselheim, How Medicare Could Get Better Prices on Prescription Drugs, 28 HEALTH AFF. 832, w832-41 (2009).
\textsuperscript{316} Kevin Outterson, Pharmaceutical Arbitrage: Balancing Access and Innovation in International Prescription Drug Markets, 5 YALE J. HEALTH POL.’Y L. & ETHICS 193 (2005). The TRIPS Agreement is a global floor of minimum intellectual property rights. TRIPS flexibilities are non-mandatory legal tools available to WTO Members to enable each country to balance the twin goals of innovation and access to medicines. Differential pricing in this context is the willingness of
developing countries at all. The entire cost of the ACE program can and should be borne by high-income countries.

As to the developing countries, if an impact on global antimicrobial resistance is desired, then the ACE conditions should include both domestic and international targets. Of course, if the companies are being asked to manage a larger problem, their financial incentives must be increased appropriately. But this company mechanism benefits from not being directly dependant on the quality of governance in the developing world. The companies are adept at getting things done despite weak governance structures. They could put that knowledge to work against global antibiotic resistance.

3. Public Investment in Antibiotic Research

Part of the ACE program involves enhanced investment in basic science funding that may lead to new antibiotic development. There have been numerous occasions where important drugs have emerged primarily as a result of public sector investment. For example, in the case of the anti-cancer drug paclitaxel, the NIH invested $484 million to fund research that eventually allowed Bristol Myers-Squibb to secure FDA approval for this compound. Bristol Myers-Squibb marketed the drug as Taxol, earning $9 billion in worldwide profits. As a result, we anticipate that improved public funding of infectious disease and resistance research will ultimately develop useful end-products, or discoveries that lead directly to the development of new antibiotics. In cases where new antibiotics are developed in part from public funding, it may be appropriate to adjust the value-based reimbursement level to reward the end-product manufacturer at a level commensurate to the amount of investment it has made in the development of the product. If the drug was developed solely with private funds, then perhaps the value-based reimbursement should allow the company to capture the greater part of the social surplus from the drug. For drugs with significant public support, the proportion would be lower. As a result, a larger drug companies to modify prices based on the ability of the purchaser to pay. Wealthy purchasers pay more; low-income populations pay much less.


318. Notably, there is a risk that manufacturers would use public funds for their research and then refuse to participate in voluntary ACE contracts. In fact, many highly transformative drugs have been based on extensive public funding and then distributed via private markets at high cost to consumers. See Bhaven N. Sampat, Academic Patents and Access to Medicines in Developing Countries, 99 AM. J. PUB. HEALTH 9 (2009). However, if the ACE program sufficiently alters the reimbursement scheme for antibiotics to provide manufacturers with a competitive rate of return for new products that are properly managed, we predict that this problem will be minimized.
percentage of the health care savings brought by the antibiotic would inure back to the government to help account for its investment drug development. This feedback mechanism supports government investment in the next generation of innovative drugs.

One objection is that this model might discourage private acceptance of public grant funding, since the large pharmaceutical companies would want to avoid the conditions described above. We think this is unlikely. Most recipients of NIH grant moneys are universities and other non-profit research groups. These groups depend on grant funding in a direct, immediate sense and will not oppose an explicit license term that modifies potential royalties to account for public support.

4. Cross-Boundary Antibiotic Management Issues

The ACE program will need to account for the ability of microorganisms to spread resistance features across political and social boundaries. For example, overuse of antibiotics also occurs outside the realm of human medicine. Livestock farmers use antibiotics to increase production efficiency, which can enhance profitability and also lower food prices for consumers. While antibiotics in livestock feed can help to promote animal growth, it has been linked to rising resistance rates in both animals and humans. In 2008, the FDA issued an order banning the extra-label use of cephalosporin antibiotics in animal feed out of concern for rising resistance rates. European authorities have moved more quickly to restrict animal uses of antibiotic classes that are important to human health. These animal uses currently serve as a source of profits to antibiotic manufacturers. However, under the ACE program,

---


manufacturers of new antibiotic agents will be better incentivized to take resistance emerging from cross-species uses into account when considering how to optimize use of their agents, which should make such additional regulations less necessary. Low-value uses in the animal sector will be replaced by higher-value uses in humans because the ACE incentives are conditioned on meeting public health goals.

Another important cross-boundary issue in the implementation of the ACE program involves whether a national-level response is the correct one. In a globalized world, perhaps all resistance issues are global. The medical evidence is more complex, as usual. To an unexpected degree, resistance issues can be local. In the Netherlands, extensive programs at the national level have maintained resistance at quite low levels.\(^{323}\) In nearby France, Italy and Greece, utilization and resistance are much higher.\(^{324}\) The Netherlands maintains this gradient across an open political barrier, which speaks to the power of national regulatory and cultural institutions to shape resistance patterns in the hospital and the community. So while we concede that many resistance issues might be global, we also insist that many national efforts such as this one are not in vain. A successful implementation of ACE in the United States could prompt similar efforts in the European Union and other valuable pharmaceutical markets. As the largest pharmaceutical market, the changes we propose to the United States will have significant spillover effects in the world, both in the types of new antibiotics that are developed and in the effectiveness and commitment to conservation globally. Since most pharmaceutical company profits are derived from U.S. sales, the ACE program will change the marketing of antibiotics globally. Inappropriate overuse in non-U.S. settings may contribute to resistance development, so pharmaceutical manufacturers will be incentivized by the ACE program to appropriately encourage conservation of their products elsewhere. Given the fact that large pharmaceutical manufacturers commonly use promotional activities to drive prescribing practices in non-U.S. markets,\(^{325}\) we predict that their contributions can help stem antibiotic resistance arising from lower-income settings. If the value-based reimbursement is sufficiently generous, companies will manage the resources globally even in the absence of parallel efforts in other major markets.

The ACE program can also be adapted to global needs. As discussed above, the U.S. government’s infectious disease advisers could keep global public health goals in mind when setting the conditions for ACE participation. Additional

\(^{323}\) Wertheim et al., supra note 148.

\(^{324}\) H. Goossens, Antibiotic Consumption and Link to Resistance, 15 CLINICAL MICROBIOLOGY & INFECTION 12, 13 (2009).

\(^{325}\) JOEL LEXCHIN, DECEPTION BY DESIGN: PHARMACEUTICAL PROMOTION IN THE THIRD WORLD (1995).
IMPROVING ANTIBIOTIC MARKETS

Prizes could be contemplated for meeting global conservation targets. But these coordination tasks are complex, and the information on cross-resistance and the mobility of resistance may be difficult to interpret. We support the work of the traditional public health agencies of governments in this effort, but also suggest that the ACE program brings the companies on board as partners in these efforts. If the companies enjoy some informational advantages in these markets, their enthusiastic cooperation may be essential to continued global effectiveness of these drugs. ACE allows the companies to use this private information for public health, without requiring public disclosure.

CONCLUSION

We share the concern that current incentives for antibiotic development are inadequate, but insist that new models are required before the market can properly evolve. Public health goals and the goals of the private actors—primarily pharmaceutical manufacturers—are woefully misaligned. Therefore, we promote value-based reimbursement that includes grants and prizes supporting both the production and conservation of antibiotics in an integrated program that accounts for dynamic effects and maximizes benefits to society. The ACE incentives, which are grounded less in property and more in contract, will address many of the problems that promote antibiotic resistance, especially the mismatch between the private value and social value of antibiotics. The incentives are focused on the private actors best positioned to coordinate private information and internalize both positive and negative externalities from antibiotic use. Most importantly, all payments are conditioned on continuing to meet conservation goals. Together, this package improves antibiotic markets for long term sustainability, a task that is urgently needed to avoid the disaster of a post-antibiotic era.

Kesselheim and Outterson: Improving Antibiotic Markets for Long Term Sustainability

Published by Yale Law School Legal Scholarship Repository, 2011