PRIZING REIMBURSEMENT: PRESCRIPTION DRUG REIMBURSEMENT AS INNOVATION INCENTIVE
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A problem perennially facing scholars of both intellectual property and health law is the need to appropriately incentivize the development of new pharmaceuticals. Although physicians have an arsenal of drugs to treat conditions like high blood pressure or cholesterol, they lack effective treatments for some of the diseases that are most devastating to our healthcare system, both here in the United States and abroad. For instance, although many mental health disorders may seem to share little in common with the World Health Organization's Neglected Tropical Diseases, each of these areas is dramatically underserved by present pharmaceutical treatments.

Yet this fact is not surprising after examining the one-size-fits-all nature of patent law and FDA exclusivity periods. These existing legal structures systematically incentivize drugs with certain types of characteristics, to the exclusion of drugs with other features. Specific design choices made in the construction of the patent law—those dealing with duration and scope, and with the market-based attributes of the system—systematically bias innovation not only away from certain types of drugs, but also away from certain types of diseases, including many neglected tropical diseases and many mental health disorders. Alternative mechanisms can be more narrowly tailored to achieve our innovation policy goals than can patent law or FDA regulation. But the academic literature has yet to consider the full potential of one major source of incentives: prescription drug reimbursement.

This Article will examine the ways in which prescription drug reimbursement in the United States, which has thus far focused entirely on access, could be tailored to restore a more appropriate balance with innovation incentives. Specifically, it will focus on the ways in which reimbursement might compensate for several of the innovation distortions created by the existing patent law and FDA regulatory regimes, providing a targeted incentive for innovation into the most underserved areas of medicine. It will first explore reimbursement's innovation potential theoretically, considering the ways in which this traditional access lever can be understood as an innovation lever, and then examining the ways in which it might be narrowly tailored to compensate for the various innovation distortions already identified. Ultimately, the Article concludes that prescription drug reimbursement may be just as effective—if not more so—than alternative innovation policy levers already considered in the literature, such as grants or prizes.

This Article will then consider a specific instance of this general principle: prescription drug reimbursement through Medicaid in the United States. At present, the way in which Medicaid pays for drugs may have the desired effect of enabling needy patients to access existing treatments, but it might perversely decrease incentives for innovation into drugs that would primarily be prescribed for low-income Americans—like those for many mental health disorders or Neglected Tropical Diseases. The Article details specific aspects of Medicaid drug reimbursement that embody this tradeoff and explores the ways in which Medicaid's prescription drug rebate system can be tweaked to maintain existing opportunities for access while simultaneously improving incentives for innovation into specific diseases.

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