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PANDEMIC PREPARATION, DEMOCRACY, AND THE MORALITY OF THE MARKET

David Silver[1]

A COMMENTARY IN THE **BUSINESS ETHICS IN TIMES OF PANDEMIC VIRTUAL SYMPOSIUM** ON Joseph Heath (2014), ***Morality, Competition, and the Firm: The Market Failures Approach to Business Ethics*** (Oxford: Oxford University Press), https://doi.org/10.1093/acprof:osobl/9780199990481.001.0001

ABSTRACT

This Commentary investigates ethical issues surrounding the US government's attempt to partner with a private company to produce a new low-cost ventilator as part of its pandemic preparation plans. I argue that firms have distinct duties with respect to such public-private partnerships. In contrast to approaches that analyze these duties in terms of an "implicit morality" of the market, I analyze them in terms of democratically authorized plans regarding how to structure the market.

THE CASE: IN 2006, the US government enacted the Pandemic and All-Hazards Preparedness Act (PAHPA), which established the Biomedical Advanced Research and Development Authority (BARDA). One issue the new agency sought to address was the high cost of ventilators. The approximately $10,000 cost for each unit was making it difficult for societies to develop a "surge capacity" of ventilators in preparation for a pandemic which attacked the respiratory system.

BARDA came up with a plan to simultaneously stimulate the development of a new low-cost ventilator, targeted to cost less than

[1] The University of British Columbia. Email: david.silver@sauder.ubc.ca

$3000, and to fill the Federal government's own emergency stockpile. The plan was to award a single company a contract in which the government committed to buy, depending on the final price, up to 40,000 units. The competitive bid process was won by Newport Medical Instruments, a small company that saw a path to profitability by combining the government contract with commercial sales to other parties. Newport set to work on the project and created working prototypes in a timely fashion.

Newport was subsequently purchased by a much larger company – improbably named Covidien – which had a vested interest in the existing ventilator market. Covidien ratcheted down work on the new ventilator project, before eventually asking to be released from its contract on the grounds that it was not sufficiently profitable. The government obliged its request – five years after the initial awarding of the contract – and began the process anew with another company. That second company had begun delivery of the commercial version of its new ventilator at the onset of the COVID-19 pandemic, but had not yet delivered any of the more basic models to the Federal government's emergency stockpile (Callahan, et al 2020).

The "Catch and Kill" Tactic

Government officials and executives at other ventilator companies have reported their suspicion that Covidien bought Newport in order to prevent the low-cost ventilator from coming to market and undermining the profitability of its existing ventilators (Kulish, et al 2020). While there are alternative ways to account for Covidien's motivations in acquiring Newport, I discuss here the ethics of the tactic it is suspected of having employed.[2]

This "catch and kill" tactic is used in a situation where the government enters into a contract with a company – let us call it the **contracting firm** – to effect some change in the marketplace. A problem arises when another company – let us call it the **threatened firm** – stands to lose more in profits from the success of the policy than is to be gained by the contracting firm. In that case it makes financial sense for the threatened firm either to take over the contracting firm and quash the project, or otherwise enter into an agreement with the

[2] Manne and Auer (2020) argue that Covidien's acquisition of Newport should not be seen as a so-called "killer acquisition."

contracting firm that allows it to maintain at least some of its otherwise lost profitability.

This "catch and kill" technique has been used by pharmaceutical companies to extend the profitability of their expiring patents. The US government awards a single generic manufacturer the exclusive right to compete against the holder of an expiring patent for a set period of time, in order to provide it sufficient incentive to invest in the manufacturing capacity for the drug. The public policy objective is both to make a cheaper version of the drug available, and to put downward pressure on the price of the name-brand option. This plan is upended, though, when the existing patent holder pays the generic manufacturer to delay its entry into the market.[3]

The Wrongness of "Catch and Kill"

One might argue that it can be wrong to use the "catch and kill" technique even when government regulators permit its use.[4] One prominent version of this argument is based on the idea that the market has an "implicit morality" grounded in its productive efficiency (McMahon 1981). In particular, the Market Failures Approach to business ethics holds that the efficiencies generated by profit-maximizing competition justify assigning the firm the goal of profit-maximization; but, this same concern for efficiency also mandates that firms not take advantage of market failures, such as those created by the "catch and kill" technique (Heath 2014: 201).

In the remainder of this Commentary I propose an alternative explanation of what is wrong with the "catch and kill" tactic that does not appeal to an overarching implicit morality of the market. The proposal is that it is wrong to use the tactic because it interferes with a reasonable government plan to structure part of the overall market. Societies have the authority not only to forbid or require market actors to engage in certain behaviors, but also to structure the market itself.

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[3] For examples in which Abbott Laboratories and Schering-Plough engaged in "pay for delay," see Pearce (2006: 77).

[4] The FTC declined to take any action with respect to the Newport-Covidien merger. One explanation posits that the FTC reasonably judged that the merger would not reduce the competitiveness of the ventilator market (Manne and Auer 2020). On the other hand, the agency's failure to take any action could also be explained by the "revolving door" between FTC regulators and industry, and by Covidien's legal strategy, which played off of the agency's general reluctance to take matters to court (Beaty 2020).

Market actors gain specific duties regarding reasonable government plans to structure the market out of respect for the society's authority to govern itself.

In the case at hand, BARDA officials sought to restructure the ventilator market to provide a new class of medical device. Their plan merits respect because the officials were operating squarely within the agency's mandate, which itself was established by the democratically-enacted PAHPA legislation. All threatened firms have a duty not to interfere with this reasonable plan, including by using the "catch and kill" technique, out of respect for the authority of this democratic society to govern itself. The contracting firms also have duties arising out of democratic respect: by voluntarily accepting its role within the plan, Newport made a binding commitment to develop and produce the low-cost ventilator, and Covidien assumed this commitment when it acquired Newport. There are conditions under which the contracting company could be released from this moral commitment, but *insufficient* profitability would not necessarily count among them. Indeed, Covidien would have had reason to carry through with the ventilator project even if it would have made even more profits re-deploying its resources to other projects, and this is due to the overall delay that its withdrawal would cause to a project with critical public health implications.

Consider how this analysis applies to the above pharmaceutical cases. The framework holds that it is wrong for a holder of an expiring drug patent to interfere with the government's reasonable plan to introduce a less costly version of the drug, including by engaging in "pay for delay." It also holds that a contracting firm has an obligation to carry through on its commitment to bring the generic version of the drug to market, even if it would make more money entering into an arrangement with the existing patent holder.

Stepping back from the particularities of the "catch and kill" technique this discussion suggests that the duties of market actors are not always based on an overarching implicit market morality, but rather are sometimes based on explicit plans instituted by a society to restructure parts of the market. Moreover, by turning our attention to the authority of societies to structure the market, it suggests that the market does not have an *implicit* morality at all, but rather is deliberately structured by societies through their political processes.

Indeed, even the duty of market actors to refrain from anticompetitive behavior can be understood as a matter of respect for a society's authority to govern itself, in virtue of its having passed laws against anticompetitive behavior.[5]

Finally, this discussion suggests that market actors' respect for the democratic governance of society requires more than refraining from illegitimate interference in the democratic political process (Silver 2015) and complying with democratically-enacted legal directives (Silver forthcoming). In order to respect democratic governance firms must recognize the situations in which they have made a morally binding commitment to fulfill democratically-authorized goals; and, all firms must recognize a duty of non-interference with democratic efforts to partner with the private sector to restructure parts of the market.[6]

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[5] While societies have good reason to proscribe anticompetitive behavior, they also have good reason to structure parts of the markets to lack competition. For example, there is good reason for a society to grant patents in order to encourage pro-social inventions.

[6] Christiano (2010) posits that firms generally have duties of cooperation with democratically-set objectives. It might turn out, though, that firms only have a duty to cooperate when they voluntarily take on certain roles in the market.

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