Foreword

The issue of access to medicines, be it in respect of HIV/AIDS, malaria, tuberculosis or any of a multitude of tropical diseases, is a constant refrain in international fora dealing with health, development and the global economy. At the 2009 G8 meeting in l’Aquila, Italy, world leaders promised, for example, to ‘implement further efforts towards universal access to HIV/AIDS prevention, treatment and care and support by 2010’. Similar sentiments have been expressed at the G20, the World Health Organization, the World Trade Organization and at the World Intellectual Property Organization. Never before has there been such broad and sustained political support for the principle of global access to medicines. Yet, these same leaders have continually failed to deliver on their statements or to provide the aid they promised.

At the same time, particularly after the 2008–2009 economic crisis, critics point to the world’s poor record on humanitarian assistance. Some, such as Dambisa Moyo, go so far as to say that current Western aid programmes have increased corruption and dependence, deepening rather than alleviating the plight of the world’s poor. Beyond that, Western countries routinely make pledges of aid that they never fulfill. As with the access to medicines debate, there is an increasing disparity between what countries say they are doing and the effects of their actions.

Debates over access to medicines and humanitarian assistance are deeply interconnected and oppositional. The failure to deliver needed medicines is taken as evidence that intellectual property rules, and patents in particular, contradict the principles of human rights since they put profits ahead of people. On the other hand, the inability to build sustainable economies in so many developing countries is seen as a failure of human rights. According to this critique, only a more market-oriented system, complete with intellectual property rights that encourage private investment, has the capacity to build such economies.

The oppositional nature of the debate between intellectual property and human rights, particularly between the private sector and civil society, has had some positive outcomes. Drawing on human rights arguments, civil society has not only put the issue of access to medicines on the international agenda but has succeeded in having the World Trade Organization adopt measures to facilitate access despite the existence of patent rights. This in turn has spurred industry to establish drug donation programmes which further encouraged civil society to push for more substantive reforms of patents and its alternatives.
Despite these positive outcomes, the opposition between human rights and intellectual property – concretely, between civil society and industry – has left millions of people without needed medicines and has had only limited success in encouraging research on the diseases that overwhelmingly affect the world’s poor. If one truly wishes to address both the economic and health conditions in developing countries, one would need to overcome this opposition.

This is, in short, the project of Louise Bernier in this book. Instead of accepting the assumption that intellectual property and human rights are incompatible, Bernier provides a common starting point for analysis of each. Drawing on a cosmopolitan theory of justice, Bernier shows how both intellectual property and human rights law share a common instrumental role in establishing a just society. While she finds faults with each, both are best understood, she argues, as different instantiations of a common vision of justice.

This understanding of intellectual property and of human rights – as instruments in attaining justice – provides for a common metric for the analysis of both. Bernier examines the extent to which each of intellectual property and human rights advances justice. The result is surprising to one who believes in the primacy of one over the other: that both advance and detract from justice equally. Only by combining both sets of laws can we truly advance the cause of access to medicines.

Moving us to the point of attempting to reconcile these disparate sets of laws is a critical first step. Bernier, at the end of this book, sketches out possible pathways to undertake that reconciliation. It is up to the rest of us to build on those pathways and to explore others.

Richard Gold