The Deadly Impacts of Privatized Pharmaceutical Data

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On my honor as a University Student, I have neither given nor received unauthorized aid on this assignment as defined by the Honor Guidelines for Thesis-Related Assignments

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In 1995, James Campbell, M.D., founder of the Johns Hopkins Blaustein Pain Center, declared pain to be the "fifth vital sign" (Scher et al., 2018). As if in lockstep, medical prescriptions for opioids began to sharply increase (National Academies of Sciences et al., 2017). As one indicator of escalating painkiller prescriptions, Purdue Pharma's OxyContin reached sales of $1.1 billion in just four years after its 1996 debut (Van Zee, 2009). The company's marketing plan used a tactic known as pharmaceutical detailing, whereby a pharmaceutical sales representative makes office visits to doctors in an effort to educate prescribers on the pros of name-brand drugs (*Sorrell v. IMS Health, INC.: The Constitutionality*, 2011). This approach largely aimed at boosting the sale of OxyContin; the more physicians prescribing a particular painkiller, the higher the chance for addiction and the higher the revenues for Purdue Pharma. Prescription data on physician's prescribing practices have become a valuable tool for pharmaceutical detailers since "knowledge of a physician's prescribing practices – called 'prescriber-identifying information' – enables a detailer to better ascertain which doctors are likely to be interested in a particular drug and how to present a particular sales message" (*Sorrell v. IMS Health Inc*, 2011, p. 2). This exploitation of health data to boost revenues serves as just one example of how outside actors shape medical care. While state policies often require the collection of prescription data for record-keeping purposes, corporations leverage this data to shape doctor and patient behavior around pharmaceutical decisions.

In the following paper, I will analyze the prescription "datafication" cycle using the competing frameworks of neoliberalism and biopower separately. I will then apply these frameworks to a particular Supreme Court Case – *Sorrell v. IMS Health Inc.,* (2011) – to provide

one example of how neoliberalism reshapes state biopower through forcing populations to comply with practices that ultimately advance corporate interests.

Prescription Management under the lens of Neoliberalism

Neoliberalism is political and economic ideology that values economic liberalization, free-market capitalism, privatization, and deregulation (Grewal & Purdy, 2014). While classic liberalism envisions society as divided into public and private spheres, neoliberalism seeks to eliminate the public sphere entirely and create a society based solely on private competition (Hepworth, 2019; Wilson, 2018). This body of thought serves as “ideological expansionism, in which market-modeled concepts of efficiency and autonomy shape policy, doctrine, and other discourses of legitimacy outside of traditionally ‘economic’ areas” (Grewal & Purdy, 2014, p. 3). As such, “neoliberalism can be summed as faith in market provision and lack of faith in state provision” (Hathaway, 2020, p. 317).

As Grenwal and Purdy (2014) outline, neoliberalism works in two main ways: defensively and offensively. The former is the more classical use of neoliberalism; it seeks to shield the market from institutional oversight or regulation. Offensive neoliberalism focuses on exploiting political powers to strengthen existing market relations, force privatization, and undo government financial regulations. The ideology itself does not support “more market, less state,” rather it proposes a particular style of governance that shields private actors from state interference (p. 8). Neoliberalism is, “always mediated through law,” regardless of “whether defensive or offensive, whether through a ‘rolling back’ of regulation or a ‘rolling out’ of market-style governance” (p. 9). Its manifestations within the law do not follow a strict formula, rather they follow any judicial pattern that attempts to “throw individuals into a situation more closely approximating classical laissez-faire than where they started” (p. 14).

Over the past century the neoliberal policy agenda has further privatized and deregulated the economic market. The corporation has become "a pure creature of the market rather than a creature of government, exempting it from any duty to the public, or accountability to the public, or even publicity to the public, and rendering it eligible for a raft of constitutional rights" (Ciepley, 2013, p. 140). Hathaway (2020) points to two neoliberal policies – free markets and non-intervention – that have created optimal conditions for businesses to increase both their social and economic power. Free markets breed unrestricted competition between private businesses in order to win over the highly coveted consumer. Thus, the neoliberal ideal of a free-market has created the need for effective advertising in the first place. Furthermore, Hathaway (2020) notes that the creation of a free, consumer-driven market "removes agency – and moral accountability – from corporations. If consumer demands are what drives the market, then corporate decisions are consumer decisions" (p. 328). The loss of corporate responsibility offers one explanation for why corporations continue practices with detrimental outcomes. Although doctors understand the highly addictive and fatal nature of opioids, in this neoliberal era the addicted consumers govern the pharmaceutical market. Neoliberal ideology supports non-intervention, believing that an "'invisible hand' system naturally moves toward/never departs from equilibrium – that, absent government interference creating perverse incentives, welfare-maximizing individuals will, through their impersonal market relations, balance supply and demand and cause markets to clear" (Hathaway, 2020, p. 324). On the Food and Drug Administration's (FDA) website, they admit to taking a hands-off approach to drug marketing, explaining that "federal law does not bar drug companies from advertising any kind of prescription drugs, even ones that can cause severe injury, addiction, or withdrawal effects" (Food and Drug Administration, 2020). The fact that the federal government refuses to regulate

the flow of information regarding fatal and addictive drugs offers one indication of how naïve trust in the market and a "consumer as king" mentality directs medicine and public health (Hathaway, 2020, p. 326).

Prescription Management under the lens of Biopower

According to Michel Foucault (1978), a French historian and social theorist, government exploitation and manipulation of bodies began with the Ancient Romans when the State – or "sovereign power" – quite literally had "the right to decide life and death" of its citizens (p. 135). Throughout the mid-1700s, Western governments transitioned from exercising the "power of death" to exerting a "positive influence on life, that endeavors to administer, optimize, and multiply [life], subjecting it to precise controls and comprehensive regulations" (p. 137). In other words, instead of the State having the power "to decide life and death," they had the power "to make live or let die" (Hull, 2017; MacGregor, 2015, pp. 49–50). This authority – later termed "biopower" – refers to the exact "set of mechanisms through which the basic biological features of the human species [become] the object of political strategy" (Foucault, 2009, p. 16). Biopower operates in two dimensions: discipline and regulation (Cisney & Morar, 2015; Taylor, 2011). The former, described as "an *anatomo-politics of the human body*," focuses on "the body as a machine: its disciplining, the optimization of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility, its integration into systems of efficient and economic controls" (Foucault, 1978, p. 139). The latter, referred to as "*bio-politics of the population*," takes a more macro-level approach, focusing "on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births, and mortality, the level of health, life expectancy, and longevity, with all the conditions that can cause these to vary" (Foucault, 1978, p. 139). In modern biopower, "*bio-politics of the*

population" controls statistical health metrics at a population-level through altering nation-state practices, commodifying bodies, and manipulating scientific literature.

In Foucault's *History of Sexuality,* he draws a direct cause and effect relationship between capitalism and biopower, explaining that "bio-power was without question an indispensable element in the development of capitalism; the latter would not have been possible without the controlled insertion of bodies into the machinery of production and the adjustment of the phenomena of population to economic processes" (Foucault, 1978, p. 140). As Cisney and Morar (2015) point out, institutions – such as the public education system or the military – seek to "normalize, structure, optimize, and subordinate the forces of individuals to enter them into the machine of the economic system, to make them *productive members of society* who will happily defend it to the death if necessary. Life, as both subject and object, has thereby emerged into the political" (pp. 6-7). A rise in biopower therefore corresponds with a rise in the administrative State that attempts to optimize the population's efficiency, increase productivity, and improve economic output (Hull, 2017).

Although biopower typically refers to the government's power over life, Ceyhan (2012) believes biopower can "be achieved anywhere by any organization" (p. 38). Individual citizens can link together and integrate into biologically-oriented citizenship classes that produce their own biopower through reshaping discussion, demands, and protocols around human health, clinical care, and rationing of services. These "organizations" – or groups of biological citizens with a shared identity – are either more empowered or less autonomous, depending on how the "information [gathered] and data-management processes and tools" influence them (Ceyhan, 2012, p. 38). In the context of the prescription datafication cycle, data analytics inform the detailers' marketing strategies, thereby empowering salespeople to advance corporate greed at

the expense of other citizenship groups' freedoms. Sparke (2017) has coined this term – "biological sub-citizenship" – to refer to any group of marginalized individuals, such as doctors and patients, who are not fully liberated biological citizens due to some external practice. If citizenship "is the way of being free," biological sub-citizenship refers to the way the government and corporations suppress certain populations (Kahn, 2014, p. 834).

With a rise in the digital information age, companies are able to collect massive amounts of data and use it to manipulate unsuspecting individuals. In *Discipline and Punish: The Birth of the Prison*, Michel Foucault (1995) analyzes the panopticon concept that that uses a prison guard tower's constant monitoring of inmates as a metaphor to explain how constant surveillance influences human behavior. Foucault argues that constant surveillance induces "the innate state of conscious and permanent visibility that assures the automatic functioning of power" (p. 201). Constant visibility underpins the entire panopticon theory; "by internalizing the 'Master's Gaze,' the individual navigating modern institutions…learns to act, and self-correct, in a manner conducive to the institution's operational needs" (Gold, 2018, pp. 135–136). Surveillance serves as a method through which corporate biopower can act; instead of a prison guard tower, Big Pharma assumes the prison guard role, constantly inspecting doctors' behaviors and searching for deviant tendencies. Aside from the direct effects of strategic marketing, Foucault would argue that just the mere awareness of Big Pharma surveillance makes doctors unconsciously strive to please the surveilling authority. Adding corporate actors into the equation distributes medical decision-making power across three groups: the expert, the patient, and the business. Thus, detailers effectively reduce both doctors and patients to sub-citizenship classes that lack complete autonomy.

Sorrell v. IMS Health Inc.

In 2007, Vermont passed the Prescription Confidentiality Law ("Act 80") in an attempt to limit the sale of prescription data to Health Information Organizations (HIOs) and pharmaceutical companies (*Case Brief*, 2011). The legislation had two distinct policy goals. First, it attempted to protect the privacy of physicians. Many doctors found the exchange of prescriber-identifiable data an invasion of privacy and felt uneasy about constant corporate surveillance (*Sorrell v. IMS Health, INC.: The Constitutionality*, 2011). Second, the law sought to limit the market power of Big Pharma and encourage physicians to prescribe cheaper, more affordable generic drugs through an "evidence-based prescription drug education program" (*Sorrell v. IMS Health Inc*, 2011, p. 4). Through this program, Vermont promoted counter-detailing – the process by which generic drugs, instead of name-brand drugs, are marketed to physicians. The state legislature argued that cost containment would drive overall healthcare costs down, making medical care more affordable and accessible. Upon enacting the law, one data-mining company – IMS Health Inc. – sued on the basis of a First Amendment violation. Ultimately, the Supreme Court held that Act 80 should be subject to "heightened judicial scrutiny" because limiting the exchange of data for certain uses places "both content- and speaker-based restrictions on speech" (*Sorrell v. IMS Health, INC.: The Constitutionality*, 2011, p. 4).

Act 80: Vermont's Questioning of Neoliberalism

Act 80 serves as one indication of how a state government begins to question its role in neoliberalism. Initially, the government mandated that pharmacies collect prescription data for drug tracking and record keeping. However, corporations soon obtained the data and began leveraging them to inform marketing decisions. According to Justice Breyer's dissenting opinion, limiting the sale of information deprived "pharmaceutical and data-mining companies of

data…that could help pharmaceutical companies create better sales messages…This effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise" (*Sorrell v. IMS Health Inc*, 2011, p. 30). The dissent also pointed out that "regulators…often find it necessary to create tailored restrictions on the use of information subject to their regulatory jurisdiction" (p. 36). For example, the Fair Credit Reporting Act of 1970 regulates the collection and use of consumer credit information, and the Health Insurance Portability and Accountability Act of 1996 protects against the unnecessary exchange of protected health data (CDC, 2019; Fair Credit Reporting Act, 1970). Act 80 sought to achieve a similar goal and limit the use of information originally collected in compliance with government standards. In doing so, Vermont attempted to close the loophole that allowed for collaboration between the public and private sectors. However, Justice Kennedy attacked this attempt, explaining that "the commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented" (*Sorrell v. IMS Health Inc*, 2011, pp. 23–24). Since the government mandated the initial collection of data, some may argue that the government constitutes the "original speaker." In declaring that the state has no role in "assess[ing] the value of" data, Justice Kennedy erodes the line between the public and private spheres through suggesting the legitimacy of using government-collected information to advance corporate interests.

The Court struck down Act 80 on the basis of preserving corporate free speech, claiming that "the law on its face burdens disfavored speech by disfavored speakers" (*Sorrell v. IMS Health Inc*, 2011, p. 8). In the same way that the government cannot restrict expression, Justice

Kennedy took a non-interventionalist approach to regulating the market, explaining that "the State may not seek to remove a popular but disfavored product from the marketplace" (p. 22). He embraced this "consumer as king" mentality, placing full faith in the consumer to regulate and balance market competition (Hathaway, 2020, p. 326). However, the prescription data market and pharmaceutical market are two closely-related, but distinct, verticals. Strictly within the data marketplace, both parties to the sale – HIOs and Big Pharma – benefit from the transaction and thus have no incentive to boycott the commodity. Those who disfavor the exchange of data, such as smaller drug competitors or physicians, only have stakeholder influence in the nearby pharmaceutical market. Since they do not have direct privity to the sale of actual data, they cannot influence the market through their own consumer decisions.

Justice Kennedy made it unequivocally clear that First Amendment always protects free speech, and by extension, data as a commodity. He claimed that "speech remains protected even when it may 'stir people to action' 'move them to tears,' or 'inflict great pain'…[and that]…'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech" (*Sorrell v. IMS Health Inc*, 2011, pp. 21–22). Non-interventionism works in tandem with reduced corporate responsibility; even if the exchange of marketing data "inflict[s] great pain," the transaction constitutes a form of expression over which the government has no jurisdiction.

Act 80: State Biopower in Action

Physicians exist as powerful stakeholders in society, as they possess a truly unique knowledge and skillset. Thus, state governments have clearly established the merits of physician authority and understand the importance of addressing physician demands. In the context of prescription datafication, Vermont found that "'unwanted pressure occurs' when doctors learn that

their prescription decisions are being 'monitored' by detailers" (*Sorrell v. IMS Health Inc*, 2011, p. 20). As Foucault would theorize, a physician's acute awareness of constant surveillance alone impacts his/her behavior. In order to "act…in a manner conducive to [Big Pharma's] operational needs," doctors may prescribe brand-name, newly-approved drugs to please detailers (Gold, 2018, pp. 135–136). Thus, Vermont enacted this legislation in order to address physician stakeholder concerns regarding their own data privacy and mitigate downstream impacts of pharmaceutical marketing.

Additionally, the power of corporate surveillance also shapes patient understanding of healthcare. In Vermont's defense of Act 80, the state claimed that pharmaceutical detailing made patients uneasy since they did not have full transparency regarding the motives of their healthcare professionals (*Sorrell v. IMS Health Inc*, 2011). Distrust of medical expertise strains the doctor-patient relationship which can lower medication adherence or decrease patient's willingness to proceed with health check-ups (*Trust*, 2017). From a Foucauldian point of view, improving the physician-patient relationship satisfies both disciplinary and regulatory goals. On an *anatomo-political* level, following physician advice and maintaining personal wellbeing allows people to maximize their own capabilities and function as efficient members of society. From a *bio-political* stance, maintaining general population health creates a more productive, self-sufficient civilization. Therefore, improving the transparency of the physician-patient relationship has health, economic, and social advantages.

Sorrell sheds light on the changing power dynamics between corporations and doctors that ultimately led to Act 80's demise. Vermont's legislative record revealed that physician-detailer meetings occur at the expense of patient appointments; this effectively lowers quality of care (S.115, 2007). Furthermore, marketing pitches also take time away from prescriber's research

endeavors. Thus, doctors become entrapped in a cycle where detailer meetings reduce the number of work hours available to research newly-approved drugs and draw unbiased conclusions. In turn, physicians must rely on advertising information in order to stay up to date with the ever-changing pharmaceutical space. Justice Breyer pointed out that "physicians are unlikely to turn detailers away at the door, for those detailers, whether delivering a balanced or imbalanced message, are nonetheless providers of much useful information" (*Sorrell v. IMS Health Inc*, 2011, p. 50). Thus, through constant surveillance and bullish marketing tactics, Big Pharma effectively pushes physicians into compliance with corporate interests. By successfully reducing the doctor to an informational bio-subcitizen and stripping him/her of personal agency, corporations have forced physicians to play the pharmaceutical marketing game where effective sales tactics, rather than safety and efficacy, drive drug success.

Vermont defended Act 80 with evidence that some doctors experienced "an undesired increase in the aggressiveness of pharmaceutical sales representatives" and have even "reported that they felt coerced and harassed" (*Sorrell v. IMS Health Inc*, 2011, p. 19). Justice Kennedy quickly rebuffs this claim, noting that "it is doubtful that concern for 'a few' physicians who may have felt 'coerced and harassed' by pharmaceutical markets can sustain a broad content based rule" (pp. 19-20). He continues by pointing out that "many are those who must endure speech they do not like, but that is a necessary cost of freedom" (p. 20). Here, Justice Kennedy rules that an individual doctor's feeling of coercion and harassment still does warrant a reasonable exercise of government power (Beck, 2011). Furthermore, the Court seems to normalize verbal harassment, explaining that it is an unavoidable side effect of "freedom." As previously mentioned, however, "harassing" sales pitches ultimately reduce physicians to a biological sub-citizenship whose rights

have not been fully realized. Thus, having to "endure" salesman puffery may preserve corporate free speech, but it comes at the expense of personal liberty.

Prescription Datafication as One Neoliberal Representation of Biopower

Foucault envisioned biopower as the set of mechanisms or tactics that the state could use to push populations towards a common goal. However, modern understanding of biopower uses more subtle devices to shape microscopic and macroscopic behaviors. The rise of politicians like Ronald Regan in the United States and Margaret Thatcher in the United Kingdom, allowed for neoliberal ideas – such as privatization and deregulation – to underpin new mechanisms through which the state could govern corporations, coordinate health information, and manage institutions of care. For example, President Reagan cut back on welfare services and enacted legislation that lengthened pharmaceutical patent protection (Angell, 2004). In 1989, access to prescriber-identifiable information became widely available and prescription marketing took off (Fugh-Berman, 2008). Although this neoliberal agenda did not immediately deregulate all healthcare or completely eliminate government services, it shifted society towards a more pro-business mentality, increased the monopolizing power of Big Pharma, and threw "individuals into a situation more closely approximating classical laissez-faire than where they started" (Grewal & Purdy, 2014, p. 14).

Sakellariou and Rotarou (2017) point out that "neoliberal reforms lead to deep changes in healthcare systems around the world, on account of their emphasis on free market rather than the right to health." In a neoliberal society, profit-driven businesses, rather than the public government, serve as the default healthcare providers. While Vermont did not completely reject the privatization of all healthcare, the state used Act 80 to raise concerns about the corrupt prioritization of profit over public good that exists when corporate actors enter the

pharmaceutical space. In Act 80's legislative findings, Vermont argued that "marketing programs are designed to increase sales, income, and profit. Frequently, progress towards these goals comes at the expense of cost-containment activities and possibly the health of individual patients" (S.115, 2007). When IMS Health, Inc., challenged Act 80 in the district court, Vermont continued to harp on this notion of profit-prioritization. They claimed that "pharmacies' primary purpose in selling prescriber-identifiable data is to make a profit," that "the IMS plaintiffs' primary purpose in acquiring such data is to make a profit," and that pharmaceutical manufacturers who purchase this data are for-profit companies (*IMS Health Inc., v. Sorrell*, 2009, pp. 4–5). Vermont added that "because generic drugs have a small profit margin and are made by multiple sources, there is virtually no economic incentive for the manufacturers of generic drugs" to counter-detail, "even where there is clear evidence that generic medications can provide therapeutically equivalent and much more affordable and cost-effective treatment" (*IMS Health Inc., v. Sorrell*, 2009, p. 10). Corporations drive the market; if businesses cannot envision a clear path to profit, relevant actors, such as doctors and patients, are kept largely unaware of these commodities. This neoliberal mentality – where profit preempts public good – has tremendous downstream significance. Vermont explains that "because drug detailing is intended to accelerate the uptake of newly approved drugs, it can have a substantial effect on patients' clinical outcomes…when detailers meet with physicians, they frequently highlight the potential benefits of drugs and downplay any known risk in order to encourage drug sales" (*IMS Health Inc., v. Sorrell*, 2009, p. 10). Thus, it becomes clear that neoliberal shaping of corporate behavior has enormous effects on health outcomes. This push towards brand-drug prescribing affects the *bio-politics* of the population, contributing increased healthcare costs which correlates to worsening health metrics and biostatistics. Sparke (2017) points out that

"pro-market growth…tend[s] to make poorer populations vulnerable to disease, disability, and premature death." Within the context of biopower alone, bottlenecking the prescription drug market has detrimental impacts to individual health and societal productivity.

What does "freedom" really mean?

While neoliberalism uses the rhetoric of free market and unrestrained competition, oftentimes, the government steps in to ensure the success of market actors. *Sorrell* offers one example of how a court of law uses the language of "freedom" to advance corporate power. In *Sorrell,* the Supreme Court granted corporations personhood and gave them First Amendment protections. Justice Kennedy took this "non-interventionalist" approach to regulating the market and supported the notion of reduced corporate responsibility in the name of free speech. The Court's blithe disregard for Vermont's legislative findings and their shaky use of the First Amendment serves as one quintessential example of how neoliberalism employs superficial rhetoric of "freedom" but ultimately acts in the interests of for-profit entities. Additionally, the Court mentioned that "[enduring] speech [doctors] do not like…is a necessary cost of freedom" (p. 24). On its surface, this claim may have merits, but in the context of *Sorrell,* speech – and corporate advertising – have the effect of stripping doctors and patients of personal agency. Through the legal manipulation of pharmaceutical data, corporations successfully push doctors into compliance with Big Pharma's wishes and interfere with patients' rights over their own bodies. The decision in *Sorrell* offers just one example of how the government's maneuvers preserve corporate freedom at the expense of "we the people."

Conclusion

Scientific research and medical technology exist as two of the few industries sitting at the intersection between civic good and corporate life. The notion of public citizenship has become

increasingly privatized, with an unspoken understanding that citizen duties include improving public good and advancing private interests (Kahn, 2014). The physician owes to the patient the duty of care, but with every treatment prescribed, he/she helps Big Pharma to maximize profits and increase shareholder dividends. Only when understanding modern-day biopower through the lens of a neoliberal framework can inherently fatal nation-state practices and the puppeteering of doctors be justified in the name of a free-market.

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