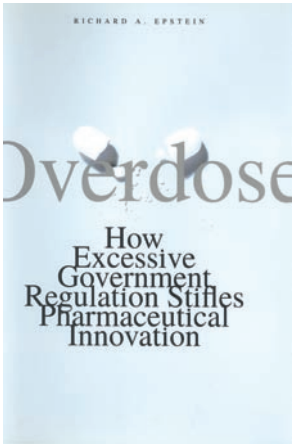

Overdose

How excessive government regulation stifles pharmaceutical innovation

Richard A. Epstein
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In *Overdose: how excessive government regulation stifles pharmaceutical innovation*, Richard Epstein confronts the many problems besieging pharmaceutical companies — accusations of unethical and illegal marketing practices, plummeting credibility with health care providers and patients, and calls for more rigorous government regulation — and declares the industry the victim of creeping government paternalism. Epstein, a law professor at the University of Chicago and a consultant to pharmaceutical companies, ascribes the industry's woes to too much government scrutiny. In eighteen chapters discussing intellectual property issues, FDA regulation of drug development and marketing, and tort claims related to drug safety, Epstein advocates one consistent solution: replace government oversight of drug companies, wherever possible, with marketplace success or failure. He describes the FDA as an economically inefficient behemoth that deprives patients of the freedom to take whatever drugs they think will help them. He argues that drug manufacturers should be free to market their products without first proving that they work — in essence, dismantling the current U.S. drug regulatory framework.

Although Epstein terms *Overdose* a study, it's really a legal polemic that could be subtitled "What's good for pharma is good for America," his title for a 2006 newspaper opinion piece (1). *Overdose* raises questions but fails to persuade, largely because Epstein consistently fails to mention evidence that might inconvenience his argument.

First, he ignores the reality that patients and health care providers cannot acquire on their own the information they need to make rational choices about drugs. Without complete information, drug market failures, in the form of poor patient outcomes, are inevitable. Epstein dismisses this problem, proposing, for instance, surfing the Internet as a replacement for FDA-required information on drug efficacy and safety.

Second, Epstein seems unconcerned about the effects of market failure. He notes the Elixir Sulfanilamide disaster of 1937, which cost over a hundred lives, without explaining how his proposals would prevent such catastrophes. He posits the effects of safety issues on companies' reputations as a deterrent to the knowing marketing of unsafe drugs, ignoring repeated examples of manufacturers doing just that. He concedes that the average patient does not have the ability to tell whether a drug is contaminated yet assumes that judging clinical trial results is a simple matter.

Finally, Epstein repeatedly distorts clinical trial science. The most peculiar section of *Overdose* is Epstein's attack on randomized controlled trials (RCTs). Epstein seizes on the heterogeneity of responses to any therapeutic intervention as evidence that reliance on RCTs is flawed. He contends that drugs that are equivalent to (or even inferior to) placebo should still be approved, arguing that patient responses in the experimental arm that are greater than the placebo mean imply efficacy for the drug in those patients — committing the blunder of rejecting the null hypothesis for a post-hoc subgroup. Epstein appears unaware, or indifferent, to the role of variations in natural history, drug response, and assessment, and the role of type 1 error. Under his scheme, patent medicine nostrums would be legal again.

Epstein also makes a number of factual errors. For example, he attacks a senior FDA scientist, Richard Pazdur, for supposed hostility toward rapid approvals for cancer drugs. In fact, Pazdur has been responsible for more than tripling the number of oncology agents receiving such approvals (2). Epstein's hidden agenda appears to be opposing more FDA-mandated information on drug efficacy and safety that might level the playing field between drug manufacturers and consumers. Along the same lines, Epstein ignores or minimizes recent misbehavior on the part of some pharmaceutical companies in concealing unfavorable data (the examples of Vioxx, Ketek, and Trasylol spring to mind), proceeding instead as though drug information is immediately provided to physicians, patients, and health insurers by virtuous pharmaceutical executives.

Epstein could have chosen to discuss real-world issues in drug regulation. For example, does the FDA treat small and large pharmaceutical companies differently, creating barriers to market entry for the former that need to be addressed? Why don't third-party payers have a market incentive to demand more complete information on drugs, a mechanism that could substitute for government regulation? Unfortunately, Epstein seems uninterested in such matters, preferring instead to cast pharma as a victim of malignant bureaucrats and lawyers. Given this, *Overdose* cannot be regarded by this reader as advancing the debate over drug regulation.

1. Epstein, R.A. 2006 December 3. What's good for pharma is good for America. *The Boston Globe*. http://www.boston.com/news/globe/ideas/articles/2006/12/03/whats_good_for_pharma_is_good_for_america/.
2. Dagher, R., Johnson, J., Williams, G., Keegan, P., and Pazdur, R. 2004. Accelerated approval of oncology products: a decade of experience. *J. Natl. Cancer Inst.* **96**:1500–1509.