A MOVEMENT, A LAWSUIT, AND THE INTEGRITY OF SPONSORED LAW AND ECONOMICS RESEARCH

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INTRODUCTION

Of the thousands of footnotes in the thousands of opinions that the Supreme Court of the United States has published over the years,1 very few capture the attention of the national media.2 Footnote 17 of Justice Souter’s majority opinion in Exxon Shipping Co. v. Baker,3 decided in June 2008, may turn out to be one of those rarities.4 In that case, which involved Exxon Shipping Company’s challenge to a $4.5 billion punitive damages award in the notorious Exxon Valdez litigation, the Court had to decide the limits that federal maritime law placed on punitive damage awards. After examining punitive damages in historical perspective, the Court penned a brief summary of recent critiques and defenses of punitive damage awards in civil litigation, most of which it drew from the academic literature. At the end of this discussion, the Court dropped footnote 17.

The footnote noted the Court’s awareness of “a body of literature running parallel to anecdotal reports, examining the predictability of punitive awards by conducting numerous ‘mock juries,’ where different ‘jurors’ are confronted with the same hypothetical case.”5 After providing numerous citations to the mock jury research, the Court added the following: “Because this research was funded in part by Exxon, we decline to rely on it.”6 One could read the footnote as a veiled endorsement of the research, which does support the Court’s

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2. For example, footnote 4 from Carolene Products is renowned in constitutional law but almost unknown to the lay public.
4. See Adam Liptak, From One Footnote, a Debate over the Tangles of Law, Science and Money, N.Y. TIMES, Nov. 25, 2008, at A16.
5. Exxon Shipping, 128 S. Ct. at 2626 n.17.
6. Id.
conclusion that the $4.5 billion award was far too high, with an associated caveat that the Court was not relying on it because of its provenance. Alternatively, one could interpret the footnote as an expression of concern about the integrity of the appellate process and a warning to future Supreme Court litigants that efforts to affect the outcomes of their appeals by funding citable research are likely to fail. I take the latter view, and I commend Justice Souter for issuing the warning. The extent to which the Court, in Justice Souter’s absence, will continue to avert its eyes from sponsored research remains to be seen.

As the Court observed (and as discussed in more detail in this Article), the research was supported by the parent company of the defendant in the litigation, and it was supported for the particular purpose of giving the company and its allies empirical ammunition for their argument that punitive damage awards by juries were inherently arbitrary. The company got what it paid for. The research did support its position, and it was able to bring it to the Court’s attention through several amicus briefs. One of the Exxon employees who approached the law professors and psychologists who undertook the research noted that, despite the disclaimer, “the arguments the justices used in part reflected the conclusions of the studies.”

Exxon’s attempt to affect the outcome of a particular legal proceeding by sponsoring academic research relevant to the judicial resolution of the claims in that proceeding raises profound questions about the integrity of policy-relevant research that is directly sponsored by entities with an economic or ideological stake in the policy or legal implications of that research. Many of the same questions are raised by the broader attempt by the Olin Foundation, several other conservative foundations, and the business community to advance their minimalist view of the role of government in society by supporting the fledgling law and economics movement in legal academia during the early 1980s. Like the Exxon-sponsored research, the sponsored law and economics research was for the most part undertaken by academics at academic institutions. Although academic institutions gratefully accept funding from private foundations and corporations to support their ongoing research programs, they are not in the business of providing research for hire to entities shopping for research that advances their economic or ideological agendas. Academic researchers and academic institutions abide by certain scholarly norms that are designed to ensure the integrity of their research and thereby


8. Liptak, supra note 4, at A16 (quoting Terry N. Gardner).
protect their reputations among their peers and peer institutions.

Relying on the Exxon-sponsored research and Olin-sponsored law and economics research as case studies, this Article will examine questions of academic integrity that arise in the context of privately sponsored academic research. Professor Wendy Wagner and I have recently taken up this issue in the context of sponsored scientific research,9 but I undertake this broader inquiry into sponsored academic research only tentatively and with the caveat that other sociologists and philosophers of science may well have different ideas. As a starting point, I begin with the proposition that sponsorship will corrupt academic research if the sponsor has the power to determine the outcome of that research and exercises that power. Furthermore, sponsorship can undermine the academic integrity of research to the extent that it interferes with the process of scholarly evaluation of the quality of that research by peers in the relevant academic discipline. Beyond that, the inquiry becomes context-dependent. Since it is normally impossible to know whether a sponsor has in fact determined the outcome of research, I suggest that it may be appropriate to conclude that sponsorship undermines the integrity of sponsored research when the researchers behave as if the sponsor controlled the research. The integrity of sponsored research may also be open to question if the implicit threat of termination of the sponsorship influences the outcome of that research.

Finally, I suggest that academics might legitimately be cautious about accepting funding from entities motivated by a desire to shape a body of scholarship out of an institutional concern for the integrity of their academic discipline. Concluding that Justice Souter’s primary motivation in declining to rely on the Exxon-sponsored research may have been his concern for the integrity of the appellate process, I argue that academic institutions might have similar concerns about attempts by well-endowed foundations and corporations to shape any academic discipline.

I. THE EXXON STUDIES

After a jury in Alaska awarded fishermen damaged by the Exxon Valdez disaster $5.3 billion in punitive damages, the Exxon Corporation (now Exxon/Mobil) contracted with several prominent law professors, psychologists, sociologists, and economists to conduct a series of studies probing the potential arbitrariness of juries in awarding punitive damage awards.10 According to Professor Theodore Eisenberg, Exxon understood that “[t]o undermine the award against it,” it had to “attack and discredit” the “everyday world of punitive damages.”11 The sponsored scholarship did just that “with hardly a nod

to actual cases” that Exxon sought “to undermine.”\textsuperscript{12} Exxon refused to disclose how much it spent on this research, calling it a “confidential matter,” but some academics estimated that the sum exceeded $1 million.\textsuperscript{13}

Exxon’s all-star roster included prominent law and economics professors A. Mitchell Polinsky (Stanford), Steven Shavell (Harvard), and W. Kip Viscusi (Harvard/Vanderbilt); Nobel Prize winning psychologist Daniel Kahneman (Princeton); social psychologist Reid Hastie (University of Chicago); political scientist David Schkade (University of Texas/University of California at San Diego); and law professor Cass Sunstein (University of Chicago/Harvard).\textsuperscript{14} Although Sunstein related that he billed Exxon only for his travel expenses, the others declined to say how much they were compensated for their work.\textsuperscript{15} The authors insisted that Exxon give them full control over the content of the research, but Exxon attorneys stayed actively involved by keeping tabs on the progress of the studies, holding numerous meetings, and commenting on research designs and rough drafts of the papers.\textsuperscript{16}

Professor William Freudenberg, a sociology professor at the University of Wisconsin (now at the University of California at Santa Barbara), prepared elaborate “field notes” on all of his conversations and meetings with Exxon representatives and later published an article on the experience in \textit{Sociological Forum}.\textsuperscript{17} Freudenberg related that Exxon employees made it clear from the outset that the purpose of the research was to aid Exxon in its \textit{Valdez} appeal.\textsuperscript{18} An attorney for Exxon told him that the Supreme Court was “thinking hard about general guidelines for punitive damage cases,” and Exxon had “good reason to feel” that its appeal would “give the justices the very opportunity they’ve actually been looking for, to spell out those guidelines.”\textsuperscript{19}

The attorney explained to Freudenberg that Exxon had lined up a number of economists who “feel that punitive damage awards are very inefficient, . . . and naturally, that’s a perspective we’re quite comfortable in supporting.”\textsuperscript{20} But the company also wanted “to work with professors in publishing things from a few other perspectives, too.”\textsuperscript{21} They were exploring “whether it’s feasible to get something published in a respectable academic journal, talking about what punitive damage awards do to society, or how they’re not really a very good

\begin{itemize}
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} Zarembo, \textit{ supra} note 10.
\item \textsuperscript{15} See Zarembo, \textit{ supra} note 10, at A1.
\item \textsuperscript{16} See id.
\item \textsuperscript{17} William R. Freudenberg, \textit{Seeding Science, Courting Conclusions: Reexamining the Intersection of Science, Corporate Cash, and the Law}, 20 \textit{SOC. F.} 3 (2005).
\item \textsuperscript{18} \textit{Id.} at 14.
\item \textsuperscript{19} \textit{Id.} at 16-17.
\item \textsuperscript{20} \textit{Id.} at 14.
\item \textsuperscript{21} \textit{Id.}
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approach.” If this was feasible, “[t]hen, in our appeal, we can cite the article, and note that professor so-and-so has said in this academic journal, preferably a quite prestigious one, that punitive awards don’t make much sense.” The attorney acknowledged that “[t]he judges themselves don’t usually read [academic articles], but often their clerks will read them . . . and quite a few of the clerks, nowadays, are pretty open to these kinds of arguments,” because they “now come out of a law and economics program or something like that.”

Professor Freudenberg submitted a discussion draft of a paper arguing that adversarial processes ran contrary to academic “prescriptions for sensible management.” The paper concluded by advocating less litigation but greater transparency in corporate risk management. After that, “reactions from the company slowed considerably.” Concerned that “openness” could lead to more lawsuits against companies, the attorneys decided to cut off support for the project. An attorney explained that the article “would be a ‘nice’ one,” but it “wouldn’t be sufficiently helpful” in the litigation to be “worth spending the additional dollars that would be required . . . to turn it . . . into a published article.” They parted “on quite friendly terms,” but Freudenberg did not publish the piece. Throughout the process, Freudenberg never felt like he was “being subjected to an evil form of pressure.” To the contrary, he “greatly enjoyed the process and the interpersonal interactions,” and “found the entire experience to be educational.”

The other scholars in the project published at least thirteen articles, all of which identified what the authors considered to be serious flaws with punitive damage awards, in prominent law reviews and psychology journals. They also turned the articles into a book published by the University of Chicago Press. The primary underlying message of the book was that the decision of whether and how to use punitive damages should be made by experts, rather than ordinary citizens who too often behaved irrationally. Professor Viscusi went

22. Id.
23. Id.
24. Id. at 16.
25. Id. at 19.
26. Id.
27. Id. at 19-20.
28. Id. at 20, 26.
29. Id. at 12.
30. Id. at 13.
31. See Eisenberg, supra note 11, at 1148; Zarembo, supra note 10.
32. PUNITIVE DAMAGES: HOW JURIES DECIDE (Cass R. Sunstein et al. eds., 2002).
33. The book concluded that the “decision process” that resulted in punitive damage awards by juries was “unreliable, erratic and unpredictable.” Id. at 241-42. The authors of the papers recommended that “serious consideration . . . be given to moving away from the jury and toward a system of civil fines, perhaps through a damages schedule.” Id.: see also Catherine M. Sharkey, Punitive Damages: Should Jurors Decide?, 82 TEX. L. REV. 381, 383 (2003) (reviewing PUNITIVE DAMAGES: HOW JURIES DECIDE, supra note 32); Neil Vidmar,
even further to urge Congress or the courts to abolish punitive damages altogether because they were ineffective in deterring risky conduct and it was bad social policy to deter such conduct too much in any event.\textsuperscript{34}

The provenance of the studies rendered them suspect to many observers—the Los Angeles Times characterized the scholars as “hired guns for industry.”\textsuperscript{35} A comparison of industry-funded law review articles on punitive damages and university-supported articles found that the former were uniformly critical of punitive damages and jury awards, while the latter “overwhelmingly defended” them.\textsuperscript{36} The study also found that courts cited industry-funded articles on punitive damages far more often than university-sponsored studies, no doubt because industry-funded articles are far more frequently cited in appellate briefs for defendants and supporting amicus briefs.\textsuperscript{37}

Several highly regarded empirical scholars mounted serious challenges to the studies on the merits.\textsuperscript{38} Among other things, the critics found serious flaws in the methodologies employed in the mock jury studies.\textsuperscript{39} For example, Professor Richard Lempert noted that the script for the mock trial upon which one of the studies was based consisted of only 3000 words, and the “trial” itself lasted only fifteen minutes. He concluded that “[t]he study’s mock jurors received so much less information than jurors receive in actual trials that there is no scientific basis for assuming that the magnitude of the effects found in this study resemble those found in actual trials.”\textsuperscript{40} Similarly, Professor Neal Vidmar concluded that the “imbalance of information provided to the simulating jurors . . . undermined the various experiments’ ability to allow scientifically appropriate causal inferences.”\textsuperscript{41} Professor Catherine Sharkey argued that the articles had not sufficiently considered the real world impact of punitive damages, both in terms of deterring unlawful conduct and in compensating

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\textsuperscript{36} Barday, \textit{supra} note 14, at 720.
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\textsuperscript{37} \textit{See id.} at 720-21.
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\textsuperscript{39} See, \textit{e.g.}, Lempert, \textit{supra} note 35, at 877; Vidmar, \textit{supra} note 33, at 1364-65.
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\textsuperscript{40} Lempert, \textit{supra} note 35, at 877.
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\textsuperscript{41} Vidmar, \textit{supra} note 33, at 1364.
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plaintiffs for damages that are not captured in the typical legal award.  

The academic critics reported that virtually all of the conclusions reached in the Exxon-funded research were inconsistent with the vast majority of published empirical studies of jury awards in the real world. This assessment starkly contrasted with the Exxon book’s claim that “[t]o our knowledge, there is not a single instance in which our results disagree with findings from other experiments conducted by independent groups of behavioral researchers or with any findings from the statistical analysis of actual trial verdicts.” Noting that student-edited law reviews seldom subject submitted articles to peer review, critics worried that “the eminence of the authors and their prolific outpouring of articles may create the impression of general scientific consensus about their conclusions.”

Despite the criticism, Exxon’s strategy was highly successful in many regards. As the Valdez appeal wound its way through an extended fifteen-year appellate process, Exxon attorneys cited the sponsored scholarship copiously in their briefs without mentioning its provenance. Amicus briefs prepared by other companies, think tanks, and trade associations in the Valdez litigation likewise relied on the studies. Federal courts in unrelated cases began to cite the research’s conclusions as established facts. One district court cited the industry-funded articles for the proposition that punitive damages “present formidable challenges to our legal system.” The judge did not mention the provenance of the research.

The Supreme Court in the Valdez case held that punitive damage awards could not exceed actual damages in maritime cases. Although the majority opinion “decline[d] to rely on” the Exxon-funded research in that case, it had already relied on the studies in an earlier case involving the standard of review.

42. See Sharkey, supra note 33, at 385.
43. See, e.g., Eisenberg, supra note 11; Feigenson, supra note 38; Michael L. Rustad, Unraveling Punitive Damages: Current Data and Further Inquiry, 1998 Wis. L. Rev. 15; Vidmar, supra note 33.
44. PUNITIVE DAMAGES: HOW JURIES DECIDE, supra note 32, at 20.
45. See Lempert, supra note 35, at 869; Barday, supra note 14, at 724.
46. Vidmar, supra note 33, at 1362.
47. See Vidmar, supra note 33, at 1361; Barday, supra note 14, at 722-23; Zarembo, supra note 10.
48. See, e.g., Brief for the American Petroleum Institute et al., supra note 7, at 15, 25-26; Brief for the Product Liability Advisory Council, supra note 7, at 10; Brief for the American Tort Reform Ass’n as Amicus Curiae Supporting Appellants, In re the Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) (No. 97-35191), 1999 U.S. 9th Cir. Briefs LEXIS 26; see also Zarembo, supra note 10.
49. See Sharkey, supra note 33, at 382; Barday, supra note 14, at 722-23.
51. See Barday, supra note 14, at 725.
53. Id. at 2626 n.17.
applicable to punitive damages challenges.54 And the studies had by that time been incorporated into the conventional wisdom on punitive damages as articulated by conservative think tanks, legislators, and talk show hosts.55 The Exxon-funded studies were featured in briefs to the Supreme Court in a case against State Farm Insurance Company that reached the Court before Exxon’s appeal.56 Two of the authors of Exxon studies, A. Mitchell Polinsky and Steven Shavell, even joined with Citizens for a Sound Economy (now FreedomWorks), a pro-business public interest group, in an amicus brief urging the Court to set aside the punitive damages award in that case.57 In State Farm, the Court overturned a large punitive damages award on due process grounds that would serve as a powerful precedent for future cases ranging far beyond the narrower admiralty question before the Court in the Valdez litigation.

II. THE LAW AND ECONOMICS MOVEMENT

A. Origins of the Law and Economics Movement

In August 1971, a prominent Richmond, Virginia, attorney named Lewis Powell wrote a lengthy memorandum to his good friend Eugene B. Sydnor, Jr., who was at the time the Chairman of the Education Committee of the U.S. Chamber of Commerce.58 Powell claimed that the “American economic system” had come under a “broad attack” from “the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and . . . politicians.”59 The leaders of the business community, however, had “shown little stomach for hard-nose contest with their critics, and little skill in effective intellectual and philosophical debate.”60 Among other things, Powell urged the business community to exert greater influence on university campuses, where social sciences faculties that “tend[ed] to be liberally oriented” were turning out students that “end up in regulatory agencies or governmental departments with large authority over the business system they do not believe in.”61

Seven years later former Treasury Secretary and “Energy Czar” William Simon wrote a best-selling polemic entitled A Time for Truth containing a

55. See Zarembo, supra note 10 (quoting Professor Theodore Eisenberg).
57. Brief for A. Mitchell Polinsky et al. in Support of Petitioner, Campbell, 538 U.S. 408 (No. 01-1289), 2002 WL 1964573.
59. Id.
60. Id.
61. Id.
similar analysis and voicing a similar plea.62 Simon urged the business community to create and support “intellectual refuges for the non-egalitarian scholars and writers in our society who today work largely alone in the face of overwhelming indifference or hostility.”63 These scholars “must be given grants, grants and more grants in exchange for books, books and more books.”64 Simon was pleased that “the most intelligent and courageous leaders” of the business community had already “faced the fact that they must fight for free enterprise before it is too late,”65 and he urged them to join him in “building up the influence of the counterintelligentsia, whose views, if known, would command a respectful hearing in the marketplace of ideas.”66

B. Funding the Law and Economics Movement

The Powell and Simon calls to action found a receptive audience in several conservative foundations with millions of dollars to invest in the “counterintelligentsia” and a willingness to make long-term investments in intellectual enterprises that would take years to bear fruit. One of their prominent beneficiaries was the nascent discipline of law and economics, which was just gaining a foothold at the University of Chicago Law School.

The largest investor in the law and economics movement was the John M. Olin Foundation, which for many years was headed by William Simon.67 In a November 1982 report to the foundation’s trustees, Executive Director James Piereson recommended that it become more of a “venture capitalist.”68 Having provided seed money for an increasingly visible student group called the Federalist Society, Piereson argued that supporting law and economics at elite law schools was “a way to work on the faculty side and the curriculum.”69 As others have explained, Supreme Court Justices were “unusually sensitive to the dominant opinion in the legal community.”70 Appellate judges were influenced by their clerks who in turn were “drawn overwhelmingly from a very small

63. Id. at 231.
64. Id.
65. Id. at 227.
66. Id. at 228.
68. TELES, supra note 67, at 187 (quoting Report from the Foundation Staff to the Trustees on the Future Direction of the Grants Program (Nov. 23, 1982) (on file with the Olin Foundation Archives)).
69. Id. at 188 (quoting Piereson).
70. Id. at 13.
group of elite law schools.”71 Consequently “[t]he ideological team best able to influence the conventional wisdom among these professional elites is likely, all other things being equal, to have a substantial advantage in court.”72 Although law school deans would almost certainly reject an Olin offer to fund programs in conservative constitutional interpretation as transparently ideological, they might be persuaded to accept a program in law and economics because it could be presented as an objective interdisciplinary discipline with substantial academic content.73

The Olin trustees were persuaded, and millions of Olin dollars began to flow into the coffers of carefully selected elite law schools, beginning with the University of Chicago. The programs supported a wide variety of activities, including faculty research, symposia and workshops, law journals, and student writing.74 One critical goal was to free up the time of established conservative legal scholars to write books and articles advocating regulatory and common law reforms. Another was to help budding young scholars meet the publication requirements for achieving tenure at respectable institutions.75 Looking toward the future, some programs established research internships akin to graduate postdoctoral programs that provided prospective law and economics professors with a year or two of unimpeded legal writing, thereby rendering them more attractive as entry-level professors.76

As the Olin programs began to flourish, other conservative foundations and individual corporations joined the effort by providing “strategic coordination and leadership as well as funding.”77 Beginning with a 1984 conference at Yale Law School on “Critical Issues in Tort Law Reform: A Search for Principles,” discussed in more detail below, they sponsored many conferences on topics related to regulatory reform and tort reform, many of which were published in the Olin-funded Journal of Legal Studies.78

71. Id.
72. Id.
73. See id. at 188-89 (quoting Piereson).
74. See JOHN J. MILLER, A GIFT OF FREEDOM 71 (2006); TELES, supra note 67, at 190.
75. See MILLER, supra note 74, at 159-60.
76. See id. at 71, 95; TELES, supra note 67, at 174-75.
77. TELES, supra note 67, at 218; see also Ira Chinoy & Robert G. Kaiser, Decades of Contributions to Conservatism, WASH. POST, May 2, 1999, at A25.
Law and Economics at the University of Chicago

Law and economics was never single-minded in scope or approach, and it has over the years blossomed into a wide variety of subdisciplines and specialties, not all of which were favorably received by the original funders. The starting point was the fundamental premise that consumers are “rational actors” who behave “as if” they are maximizing their own utility as determined by an underlying and consistent set of ordered preferences. For many neoclassical economists, this observation was not so much an assumption as it was an empirical observation “as complete as belief based upon any number of controlled experiments.” From this “elementary fact of experience” flowed the equally fundamental conclusion that outcomes reached by freely functioning markets reflect the preferences of the individuals participating in those markets and therefore serve as the best measure of overall welfare.

Law and economics came in “positive” and “normative” flavors. Positive law and economics drew on the tools of economic analysis to describe the behavior of markets and related institutions. Professor Richard Posner’s initial project, for example, was devoted to demonstrating that nineteenth century common law courts behaved as if the ultimate goal of the common law was to maximize overall wealth. Positive law and economics provided (and continues to provide) many useful insights into how legal systems function in market environments. Like the original funders, however, this Article will focus primarily on the far more controversial normative branch of law and economics.

The enormously ambitious goal of normative law and economics was to

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81. Hackney, supra note 80, at 93 (quoting Lionel Robbins).
82. See id. (quoting Lionel Robbins).
84. See Mercuro & Medema, supra note 80, at 61; Veljanovski, supra note 80, at 21; Michael Trebilcock, The Value and Limits of Law and Economics, in The Second Wave of Law and Economics 12, 12 (Megan Richardson & Gillian Hadfield eds., 1999).
derive objective legal rules and institution-building guidelines from the simple bedrock principles of neoclassical economics.\textsuperscript{86} If properly functioning markets were the best measure of overall welfare, then the proper role of government was the limited one of defining and protecting the property and contractual rights required for a smoothly functioning marketplace.\textsuperscript{87} Beyond that, government intervention should be limited to instances of demonstrated failures of the market to reflect consumer preferences and designed to provide incentives aimed at steering rational actors toward the outcomes that markets would have reached but for those market imperfections.\textsuperscript{88} The project of normative law and economics was to identify instances of market failure, suggest legal rules that provided the right incentives to correct those failures, and critique legal rules that did not achieve that overall goal.

Normative law and economics appealed to a broad range of legal scholars, judges, policymakers, and, conveniently, the business community. Conservative foundations and corporations supported the particular brand of normative law and economics that emerged in the early 1970s at the University of Chicago Law School because it arrived on the scene first and because it cogently and consistently redefined “public welfare” to include a strong presumption against government intervention into private markets that was generally consistent with the economic interests of the business community.\textsuperscript{89} The Chicago scholars accomplished this by making economic efficiency, defined as “wealth maximization,” the primary (often exclusive) criterion for evaluating public policy outcomes.\textsuperscript{90} Since economic efficiency bore the attractive patina of objectivity, proponents of the Chicago School approach could claim that it was “scientific,” rather than subjective and therefore imminently contestable.\textsuperscript{91}

\textsuperscript{86.} See, e.g., Mercuro & Mezema, supra note 80, at 66-74; Veljanovski, supra note 80, at 2; Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968) (using economic models to explain how we should punish certain types of crime); see also Richard A. Posner, Gary Becker’s Contributions to Law and Economics, 22 J. LEGAL STUD. 211, 213 (1993) (explaining Becker’s contributions to “a theoretical literature” in law and economics); Trebilcock, supra note 84, at 17.

\textsuperscript{87.} See Mercuro & Mezema, supra note 80, at 18; Veljanovski, supra note 80, at 9; Crespi, supra note 79, at 151.

\textsuperscript{88.} Morton J. Horwitz, Law and Economics: Science or Politics?, 8 Hofstra L. Rev. 905, 909 (1980); see also Hackney, supra note 80, at 109-10.


\textsuperscript{90.} See Mercuro & Mezema, supra note 80, at 14, 69.

\textsuperscript{91.} See Hackney, supra note 80, at 108 (discussing Posner’s “bold attempt to harness the prestige of science in the service of legal-economic theory”); Horwitz, supra note 88, at 905, 912.
D. Law and Economics Spreads

The Olin-sponsored law and economics program at Chicago underwrote a number of important articles and books. Once Posner and his Chicago colleagues had laid the groundwork, the law and economics movement spread rapidly to other law schools. By the mid-1970s, a working competence in law and economics was perceived as a great advantage in legal education. Before long, the pool of budding young law professors was brimming with lawyers who claimed to be experts in law and economics. Perhaps the most important factor underlying this rapid ascendency of law and economics was the willingness of the Olin Foundation and other early sponsors to devote substantial resources to spreading that particular gospel.

Convinced that it could get more bang for the buck by focusing on elite law schools, Olin awarded a substantial grant to Yale Law School to establish the John M. Olin Center for Studies in Law, Economics, and Public Policy. The director of the Yale program, George Priest, was a prominent Chicago-trained scholar of tort law who was skeptical about the expansions of products liability that the courts had accomplished during the 1960s and 1970s. Priest later recalled that bringing law and economics to Yale was not “controversial in the slightest, because it brought in a lot of money, and schools can always use money.” Olin officials were similarly pleased. An internal memo reported that the Olin staff “considers the law and economics program at Yale to have been an excellent investment.” The Olin Foundation contributed more than $11 million to that program over the years.

The first major undertaking of the Olin Center at Yale was a conference devoted to “Critical Issues in Tort Law Reform: A Search for Principles.” More than 120 prominent torts scholars, state and federal judges, policy makers, practicing attorneys, and corporate officials convened in New Haven in September 1984 to discuss a set of commissioned papers. In addition to the

92. MILLER, supra note 74, at 72.
93. See TELES, supra note 67, at 100.
94. See id. at 99 (quoting Yale Law School professor Michael Gratz); id. at 100 (quoting University of Chicago professor Douglas Baird).
95. See id. at 96-97.
97. See TELES, supra note 67, at 186-87.
98. See MILLER, supra note 74, at 77.
100. TELES, supra note 67, at 190 (quoting George Priest).
101. Id. at 190 (quoting a document written towards the end of the existence of the Olin Foundation).
102. MILLER, supra note 74, at 77.
103. Priest & Epstein, supra note 78, at 459.
104. See id. at 459.
Olin Foundation, the conference’s sponsors included forty-two companies, nearly all of which were frequent defendants in products liability lawsuits. The commissioned papers, all of which were published in the University of Chicago’s Journal of Legal Studies, ranged from Professor Alan Schwartz’s highly theoretical expositions on the relationship between products liability, corporate structure, and bankruptcy to Professor Richard Epstein’s polemic against the evolution away from nineteenth-century privity requirements in products liability law. Professor Posner coauthored a paper providing a quasi-empirical “positive” economic analysis of products liability law. Conference host George Priest contributed a lengthy paper arguing that the expansion of products liability law during the 1960s and 1970s represented a judicial adoption of an “entirely novel” theory of “enterprise liability.” The clear message of the conference was that tort law was badly in need of reform and that judges and legislators should move expeditiously to realign tort doctrine to fit the Chicago School law and economics model of the proper role of civil liability. Other law and economics scholars soon joined Priest in a major effort to remake tort law in the Chicago School image.

Inspired by the success of the programs at Chicago and Yale, conservative foundations and corporate sponsors created similar programs at several other prominent law schools, including Stanford, the University of Virginia, and the University of Southern California. The fact that law and economics scholars at these institutions were sometimes less doctrinaire than their Chicago School counterparts only enhanced the credibility of the discipline in the minds of law professors, many of whom viewed the emerging discipline skeptically because of the source of its financial support. When a program strayed too far from the ideological boundaries defined by the watchful sponsors, however, it soon found itself “defunded.”

105. See id. at 460.
110. This is certainly the message that the author of this Article, who participated in the conference, took away from it.
111. See, e.g., Walter Probert, The Politics of Torts Casebooks: Jurisprudence Reductus, 69 TEXAS L. REV. 1233, 1239-44 (1991) (describing the efforts of Posner and Epstein to remake tort law by writing torts textbooks); Rustad & Koenig, supra note 67, at 85 (same).
112. See MILLER, supra note 74, at 77; TELES, supra note 67, at 118.
113. See TELES, supra note 67, at 133.
114. See, e.g., MILLER, supra note 74, at 80 (describing the defunding of the law and economics program at Duke Law School).
E. Law and Economics Evolves

As law and economics became a popular topic for law school courses and law reviews, scholars with PhD’s in economics and related disciplines and training in empirical analysis began to migrate into the field.115 The discipline became far more sophisticated than in the early days when it was dominated by lawyers who fancied themselves sufficiently trained in economics because they had taken a course or two from Aaron Director or Ronald Coase.116 Some early arrivals, like Richard Markovits and Michael Trebilcock, were highly skeptical of the simplistic prescriptions that flowed from the dabbler’s unrealistic assumptions.117 Using complex models that relaxed assumptions about the absence of transaction costs and monopoly power, they came up with “second best” solutions to social problems in which government regulation played a far larger role.118 Others like Ian Ayers, John Donohue, and Simon Deakin demonstrated that Posner and his Chicago School colleagues inappropriately manipulated economic analysis to produce prescriptions that were nearly always consistent with laissez faire solutions to the relevant problems.119 They also objected to the Chicago School’s tendency to equate utility with wealth, a severely reductionist sleight of hand that “the entire economics profession” viewed with suspicion.120 Economists with greater sensitivity to the limitations of economic analysis accused legal scholars who sought to extend the rational actor model to nonmarket human behavior of “economic imperialism.”121

In the 1990s, a “second wave” of law and economics scholars not as strongly committed to the free market paradigm demanded a voice.122 Second

116. See HACKNEY, supra note 80, at 166; TELES, supra note 67, at 207-08; VELJANOVSKI, supra note 80, at 16; Richardson, supra note 89, at 2-3; Tushnet, supra note 79, at 449, 451-52.
120. Donohue & Ayers, supra note 119, at 797.
121. ECONOMIC IMPERIALISM (Kenneth E. Boulding & Tapan Mukerjee eds., 1972); see also VELJANOVSKI, supra note 80, at 2.
122. See Lawrence Lessig, The New Chicago School, 27 J. LEGAL STUD. 661 (1998); Richardson, supra note 89, at 3.
wave scholars, who claimed to be far more “self-reflective and critical”\textsuperscript{123} than the Chicago scholars, embarked on a “humbler endeavor”\textsuperscript{124} that showed “greater respect for the complexity of law.”\textsuperscript{125} They stressed the capacity of law to change societal norms, thereby changing the way rational actors behaved in making economic decisions.\textsuperscript{126} They demanded rigorous empirical testing of the assumptions underlying the Chicago School models before accepting them at face value.\textsuperscript{127} They believed that economic analysis could contribute to progressive critiques of existing economic arrangements by providing “an arsenal of tools for making plain the way income inequality or power differentials are created or perpetuated through markets and institutions.”\textsuperscript{128} Unwilling to limit themselves to a single discipline, they searched for insights in anthropology, sociology, and psychology.\textsuperscript{129}

F. Impact on Law and Policy

As James Piereson predicted, law and economics became an effective vehicle for incorporating a business-friendly approach to common law and regulatory policy into American legal education.\textsuperscript{130} By the late 1970s, law and economics had established a beachhead in many of the nation’s elite law schools.\textsuperscript{131} In the ensuing three decades, it “rapidly moved from insurgency to hegemony.”\textsuperscript{132} As the movement entered the twenty-first century, the Law and Economics Association claimed more than a thousand members,\textsuperscript{133} and every major law school had a program in law and economics.\textsuperscript{134} Legal scholars in many fields needed at least a passing familiarity with law and economics to comprehend the

\textsuperscript{123} Richardson, supra note 89, at 2.
\textsuperscript{124} Hadfield, supra note 119, at 50.
\textsuperscript{125} Id. at 54.
\textsuperscript{127} See Deakin, supra note 89, at 32; Hadfield, supra note 119, at 55-57; Richardson, supra note 89, at 5; Trebilcock, supra note 84, at 12.
\textsuperscript{128} Hadfield, supra note 119, at 58.
\textsuperscript{129} See Richardson, supra note 89, at 2.
\textsuperscript{133} Baird, supra note 130, at 1129.
Clearly pleased with this development, Judge Posner has observed that "the casual invocation of ‘fairness’ as an answer to difficult legal problems has become increasingly untenable, even incredible, as a response to the challenges of economics." The Olin-sponsored programs at elite law schools gave the budding discipline’s normative critique of federal regulation and expansive tort liability an instant credibility with judges and public policymakers that contributed greatly to rapid changes in both fields.

Because judges rely upon legal scholarship in crafting legal opinions and value the reinforcement that legal scholarship can provide for their own views, law and economics scholarship has played an important role in shaping administrative law and tort law. As the courts began to employ law and economics concepts with some frequency in their opinions, the demand for lawyers trained in the discipline increased, and student demand for courses in law and economics rose. Legal scholars trained in law and economics also provided much of the theoretical foundation for the business-oriented reforms of the civil justice system in the past three decades. And supporters of economic deregulation in the late 1970s and regulatory relief in the mid-1990s through the mid-2000s drew heavily on law and economics.

The singular success of the law and economics movement did not flow from a comprehensive plan. The movement was, however, heavily influenced by the funding decisions of a handful of major foundations that over the years devoted more than $68 million to the cause. For these foundations, the success of the law and economics movement was gratifying. The movement’s strong focus on the economic consequences of legal rules provided “an intellectual discipline previously lacking” and a “powerful analytic tool for people worried about the growth of government and an unchecked...

135. See Hay, supra note 89, at 77.
138. See Schwartz, supra note 131, at 694.
139. See Miller, supra note 74, at 71; Regnery, supra note 96, at 242.
141. See Miller, supra note 74, at 71; Schwartz, supra note 131, at 694.
142. See Miller, supra note 74, at 71; Baird, supra note 130, at 1145-46 (quoting Richard Posner).
143. Teles, supra note 67, at 90-91.
144. Miller, supra note 74, at 62; see also Kitch, supra note 140, at 232 (suggesting conservative backing of law and economics is “a story of ideas in the service of power”).
145. See Teles, supra note 67, at 198.
146. Regnery, supra note 96, at 243.
judiciary.” The meetings and conferences provided a “scholarly shelter” where conservative scholars could network, share ideas, and critique mainstream legal scholarship. At the same time, the presence of law and economics programs in the law schools “weakened [the] reign” of liberal law professors. When the Olin Foundation spent down its assets in 2005, it awarded $21 million in “termination” grants to a number of law schools, including $10 million to Harvard, $3.4 million to Yale, $3 million each to Chicago and Stanford, and $1.2 million to Virginia to ensure that the influence of law and economics would extend well into the future.

III. INDEPENDENT SCHOLARS OR HIRED GUNS?

A good measure of the quality of academic research is the extent to which, in the judgment of the scholars within the relevant academic discipline, it adheres to the norms of that discipline. To the extent that the research is empirical in nature, for example, the norms of science are presumably the relevant norms, and empiricists within the relevant scientific discipline are the proper evaluators of the quality of the research. Although sociologists and philosophers of science have on occasion attempted to define broad norms of science, those norms tend to vary from discipline to discipline. I am unaware of similar attempts to articulate the norms of law and economics, but I suspect that any such attempt would generate as much disagreement as consensus. In a very real sense, the scholars in the discipline “know it when they see it,” and for present purposes that is probably sufficient.

A. Sponsor-Controlled Research

In recent years, reports have appeared in both the academic literature and the popular press on research that became corrupted by the influence of the sponsors over the outcome of that research. Not all of this research was undertaken by academics for academic audiences, but much of it was. At the very least, sponsor-controlled research violates the scientific norm of disinterestedness. Empirical research that reaches a predetermined outcome is corrupt, whether the underlying motive is to increase the researcher’s personal wealth, to maintain a source of ongoing research support, or simply to

147. MILLER, supra note 74, at 81.
148. Id.
149. Id.
150. Id. at 200-01.
152. See McGARITY & WAGNER, supra note 9, at 66-76, 87-89.
153. See MERTON, supra note 151, at 275-77 (describing the norm of disinterestedness).
advance the researcher’s status within the relevant discipline.\textsuperscript{154}

Although I am not as familiar with the norms of research in other disciplines, I am confident that most academics would accept the general principle that when a sponsor with an economic or ideological stake in the outcome of any academic research controls the outcome of that research, that control alone is sufficient to undermine the academic integrity of the research. For example, the \textit{New York Times} recently published an investigative report based on documents produced in hormone therapy litigation detailing how the manufacturer of Premarin and Prempro hired a company to arrange with academics from a prominent medical school to author review articles.\textsuperscript{155} A review article is not empirical research. It represents the author’s attempt to synthesize and analyze the corpus of research in a selected area. The review articles in this case were researched and written by the company’s employees. The role of the academic was limited to reviewing a proposed outline, reviewing the company-prepared manuscript, making modest editorial changes, and submitting the revised manuscript for publication in a prominent medical journal under his or her name.\textsuperscript{156} The purpose of this exercise was to influence the views of other academics and medical practitioners on the safety and effectiveness of the drugs.

This was by no means an isolated instance of a reputable academic journal unknowingly publishing a “ghostwritten” review article.\textsuperscript{157} The scientists who participate in these exercises and the pharmaceutical companies that supported them invariably defend the substance of the articles and challenge critics to identify any flaws in the synthesis or analysis. But the quality of the article is, from the perspective of academic integrity, beside the point. When scholars claim authorship of academic papers, they represent to their academic peers that the conclusions contained therein are their own. If any aspect of the contents of that paper was in fact controlled by a sponsoring entity, it is simply deceitful for them to make that representation. Because that degree of deceit clearly interferes with the process of evaluation by peers in the relevant academic discipline, the scholarship lacks academic integrity.

The troubling aspect of sponsor-controlled research, however, goes beyond simple honesty. If the scholar dropped a footnote informing the reader that the author’s conclusions were in fact controlled by a sponsor with an economic or ideological stake in the research, the publication would no doubt cause other scholars in the discipline to question the academic integrity of a scholar who would allow his name to be listed as the author of such a publication. Indeed,

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\textsuperscript{154} See Helen E. Longino, Science as Social Knowledge 216 (1990); McGarity & Wagner, supra note 9, at 7; Karl R. Popper, Conjectures and Refutations 56 (5th ed. 1992).
\textsuperscript{156} See id. at A1.
\textsuperscript{157} See McGarity & Wagner, supra note 9, at 77-79.
\end{flushleft}
even if a scrupulously honest scholar informed the reader that the reason he lent his name and academic reputation to the piece was because the sponsor paid a lot of money for the patina of respectability that it afforded (as is probably the case with “ghostwritten” drug articles), that motive alone would no doubt undermine the integrity of the article in the assessment of the scholar’s academic peers. The objective quality of sponsor-controlled research is, in short, irrelevant to its academic integrity.

If the Exxon Corporation exerted sufficient influence over the empirical punitive damages research it sponsored to affect its outcome, by designing the protocols for the research, manipulating the data that the researchers collected, or influencing their interpretation of those results, that fact alone would have undermined the integrity of the research. Since the research was not introduced in court through expert testimony and was therefore not the subject of discovery and cross-examination, it is hard to know for sure whether the research was in fact free from Exxon’s influence.

According to Professor Freudenberg’s account, the company did not play a significant role in determining the outcome of his research. It did, however, terminate its support when it appeared that the research was likely to reach at least one conclusion that the company did not want to see published in the academic literature. Whether this alone was sufficient to undermine the integrity of the remainder of the Exxon-funded jury research is a difficult question for which there is not an easy answer. In my view, that fact alone would have undermined the integrity of the remaining research if the researchers were aware of the termination of Professor Freudenberg’s research and if the implicit threat inherent in that action affected the course of their own research. A sponsor’s threat, explicit or implicit, to terminate an empirical research project that reaches conclusions not to the sponsor’s liking is, in my view, a sufficient degree of sponsor control to undermine the research’s integrity if it affects the subsequent course of that research. If, on the other hand, the other researchers were unaware of the fate of the Freudenberg project or if they were aware of it but unaffected by it in conducting their own research, then that degree of sponsor control would not have been sufficient to undermine the integrity of that research.

To the extent that academics engaged in sponsored law and economics research allow the foundations or companies sponsoring their research to determine, explicitly or implicitly, the outcome of that research, that fact alone, in my opinion, would undermine the integrity of that research. I am unaware of attempts by the sponsors of law and economics research to determine the outcome of any particular research project. Determining particular research outcomes was not really the object of Powell’s and Simon’s pleas to fund academic research, and the foundations and corporations were apparently more interested in ensuring that the minimalist perspective of a particular brand of

158. See generally supra text accompanying notes 17-30.
normative law and economics research finds its way into the mainstream of legal scholarship.

B. Secret Sponsorship

The academic literature and popular press also contain many accounts of sponsored research that academics have published in scientific journals without identifying the sponsor or the nature and extent of its support. The fact of sponsor control was hidden from academics in the relevant disciplines who were in a position to evaluate its quality during the formal peer review process that attends most scientific research and during the general process of review and evaluation that takes place over time as academics draw conclusions about the quality of the research and incorporate it into the larger corpus of scholarship. The provenance of the research was no doubt hidden out of a realistic fear that knowledge of its source would adversely affect its assessment by peers in the discipline. Since policymakers and legal decision makers are not likely to rely on research that the academic community devalues, revealing the fact of sponsorship would have defeated its purpose.

Failing to reveal the provenance of sponsored research is, in my view, sufficient by itself to undermine its academic integrity for the simple reason that it impedes the ability of academics in the relevant scientific community to evaluate its quality. They cannot know whether to look for evidence of sponsor manipulation in the research if they are unaware of the fact of sponsorship. The scientific community is coming around to the view that scientific researchers have an obligation to make the provenance of sponsored scientific research accessible to the readers of scientific publications, at least to the extent that the sponsor has an economic or ideological stake in how the research is used in legal or policymaking contexts. Legal academics have adopted a similar approach to the provenance of sponsored research. The American Association of Law Schools’s Statement of Good Practices by Law Professors in Discharge of Their Ethical and Professional Responsibilities provides that law professors “shall disclose the material facts relating to receipt of direct or indirect payment for, or any personal economic interest in, any covered activity that the professor undertakes in a professorial capacity.” Disclosure is not required for salary and internal research grants, or “funding . . . that is sufficiently modest or


160. See McGarity & Wagner, supra note 9, at 233-34.

remote in time that a reasonable person would not expect it to be disclosed."  

The good practices statement does not require disclosure of the amount of the support, but it does require disclosure of “the conditions imposed or expected by the funding source on views expressed in any future covered activity.”  

Failure to acknowledge significant support (e.g., summer salary or support for research assistance) would, in my opinion, be sufficient to undermine the integrity of law and economics research or any other research published in an academic journal.

In the case of the Exxon-sponsored jury research, it appears that the sponsorship was apparent to the careful reader of the published articles and the Sunstein book. The introductory footnotes to some of the articles, however, tended to de-emphasize Exxon’s support by including other sponsors of the researcher that did not fund the jury research in particular and presumably did not attempt to control its outcome. Many Olin-supported law and economics articles acknowledge the support of the foundation and/or the law and economics centers that the foundation established at some law schools. Indeed, I would not be surprised to learn that the sponsors of general academic research insist on such acknowledgment as part of the grant arrangements. I am unaware, however, of any systematic empirical inquiry into the sponsorship of academic research in law and economics.

C. Beyond Independence and Disclosure

Assuming that the provenance of sponsored academic research is clear and that there is no clear evidence that the sponsor controlled its outcome, are there situations in which the fact of sponsorship alone can undermine the research’s integrity? Many published studies on the provenance of scientific research stand for the proposition that research sponsored by an entity with an economic stake in its outcome is far more likely to reach conclusions that are consistent with the sponsor’s economic interests than research on the same general topic sponsored by an entity without an economic stake in the outcome. That phenomenon, however, may be attributable to the simple fact that a sponsor with an agenda will predictably seek out academics who have in the past published research that supports the sponsor’s agenda. It does not necessarily support the conclusion that academics who accept funding from entities with an

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162. AM. ASS’N OF LAW SCH., supra note 161.
163. Id.
164. Cf. Lippitt, supra note 163, at 1088 (noting that the disclosure of one of the Exxon-funded professors made it “impossible to determine how much ‘support’ Exxon or the Olin Center for Law, Economics and Business at Harvard Law School gave to him”).
165. See McGARITY & WAGNER, supra note 9, at 95-96; Jane Levine, Joan Dye Gussow, Diane Hastings & Amy Eccher, Authors’ Financial Relationships with the Food and Beverage Industry and Their Published Positions on the Fat Substitute Olestra, 93 AM. J. PUB. HEALTH 664, 664-69 (2003).
economic stake in the research routinely bend the results of their publications in the direction preferred by the sponsor.

D. Supporting a Perspective

The Exxon attorney who contacted Professor Freudenberg explained to him that Exxon had lined up a number of economists who “feel that punitive damage awards are very inefficient, . . . and naturally, that’s a perspective we’re quite comfortable in supporting.”166 In other words, Exxon sought out economists who were likely to reach conclusions that the company favored when it was deciding which research to fund. This procedure, of course, differs dramatically from the traditional procedures for funding academic research under which applicants submit proposals for grants that are reviewed on their merits by academic peers and funded in accordance with their evaluation of the quality of the research and the likelihood that it will be successfully completed.167 But that fact alone does not undermine the integrity of research that receives support via less conventional procedures. Even in “hard” scientific disciplines like physics, several perfectly respectable schools of thought frequently compete for acceptance. Support for one school of thought may result in more publications, but the scholars in the discipline will determine the quality of those publications, and the academics will probably not be swayed by the sheer magnitude of the number of publications.168 This analysis suggests that it would be unfair to belittle the academic integrity of the law and economics research sponsored by the Olin Foundation and others solely on the ground that the sponsors came to the project with an agenda.

E. The Appearance of Control

The mere fact of sponsorship may undermine the integrity of sponsored research when the researchers behave as if the sponsor controlled the research, even though it is impossible for outsiders to demonstrate objectively that the sponsor is in fact controlling the research. If the researchers allow the sponsor to participate in the research design, consult with the sponsor during the conduct of the research, or give the sponsor an opportunity to review and comment on the research prior to publication, the researchers are behaving as if they were allowing the sponsor to direct the outcome of the research, even if in fact the sponsor exercises no direct influence on its progress. The strong appearance of sponsor control generated by the degree of sponsor involvement

166. Freudenburg, supra note 17, at 14.
168. Judges and policymakers, on the other hand, may be swayed by the length of the citation list. While this is undoubtedly a matter for concern within the legal and policymaking spheres, it does not go to the integrity of the research itself.
may, in other words, be sufficient to undermine the integrity of the underlying research. I am not sufficiently familiar with the procedures that the Olin Foundation and others employed to review or comment on individual papers prior to publication. The accounts with which I am familiar, however, indicate that the sponsors of law and economics research did not involve themselves in reviews of individual projects.

The fact that Professor Freudenberg submitted a discussion draft of his sponsored paper to Exxon’s attorneys for review indicates that he was behaving as if Exxon controlled the outcome of the research. Professor Freudenberg did not publish the research, and his published account of the experience suggests that he was unwilling to address Exxon’s concerns by agreeing to remove his advocacy of greater transparency of corporate risk management. Had he published the research and had the degree to which Exxon participated become public, his academic peers might legitimately have questioned the integrity of the research, even though he in fact retained his academic independence, because they could not know the degree to which the sponsor with a clear opportunity to control the outcome took advantage of that opportunity.

F. The Implicit Threat of Termination

The integrity of sponsored research that the sponsor does not directly control may also be suspect if the researchers feel pressure to “bend” the results in the direction that the sponsors prefer. In particular, an academic might shape his or her research to suit the sponsor in order to ensure future support from that sponsor. The degree to which this subtle pressure undermines the integrity of the sponsored research will probably depend on the context in which the support is given and received. At one extreme, an untenured “research associate” at a university “center” who must come up with sufficient grant money to support himself and his staff may feel a great deal of pressure to produce results that are pleasing to a sponsor that has been the dominant source of his or her research support. At the other extreme, a researcher who holds an endowed chair or receives support from a number of sources, not all of which have an economic or ideological stake in the research, is not likely to be swayed in the least by the threat of losing some small proportion of his or her future support. Information about the provenance of the research (and especially the percentage of the scholar’s research support that comes from a particular sponsor) may, in such cases, be crucial to the evaluation of the quality of that research by other academics in the discipline and therefore essential to an assessment of the academic integrity of that research.

An integrity analysis of the support provided by the Olin Foundation and others for the law and economics movement may proceed along similar lines. Funding an endowed position (even one with an implicit ideological orientation, like a chair in “free enterprise”), raises few questions from the perspective of academic integrity. It will not necessarily advantage one side in
an ongoing academic debate, because academics, and not the sponsors, determine who receives the funds generated by the endowment. Neither the recipient nor the institution should feel any pressure to steer his research in any particular direction out of fear that the sponsor will withdraw the support. The Olin Foundation, however, rarely endowed law and economics programs, and it was not above “defunding” programs that did not consistently hew to its conservative views.  

In the case of unrestricted but terminable support, the recipient may feel some pressure to steer research in a direction that will ensure continued funding by advancing the sponsor’s legal or policy agenda. If the support goes to the institution, rather than to individual academics, however, any threat of lost resources is diminished to the extent that the institution has other sources of support. The effect of a cutoff is even more attenuated for the individual academics employed by the institution. Consequently, foundation and corporate support for the law and economics movement through terminable contributions to law schools is not likely to yield a sufficient degree of sponsor control to give rise to serious concerns about the integrity of the sponsored research.

The degree to which the subtle pressures inherent in terminable research support should cause judges and policymakers to disregard sponsored research is also likely to be context dependent. The fact that Exxon apparently funded individual researchers, rather than their institutions, would argue against considering the research because of the subtle pressure that an implicit threat to withdraw that support would have exerted on the researchers. On the other hand, the law professors who conducted the research held tenured positions and were no doubt well compensated by their institutions. The threat of a cutoff of Exxon funding would have had minimal impact on their circumstances, and there was no clear prospect of additional support for related projects that could generate a desire to please the company’s executives. To the extent that the professors followed Professor Sunstein’s lead and refused compensation beyond out-of-pocket travel expenses, the threat of a cutoff was de minimis.

Justice Souter’s brief footnote in the Valdez opinion does not indicate that he was troubled by the extent to which the researchers involved in the Exxon-sponsored research relied upon Exxon’s support in the present or future. He apparently concluded that the mere fact of sponsorship was sufficient to limit its use as a citable reference in support of his quasi-empirical analysis of the question of whether juries behave rationally in awarding punitive damages. If Justice Souter’s only concern was for the likelihood that the researchers bent their conclusions to suit a sponsor, that concern seems misplaced in this context. But that may not have been his only concern.

169. See Miller, supra note 74, at 80 (describing the defunding of the law and economics program at Duke Law School).
170. I am not sufficiently familiar with the nature of the positions held by the psychologists in the Exxon-funded punitive damages research to opine on the extent to which they might have been swayed by the threat of loss of future Exxon support.
G. The Integrity of the Discipline

Justice Souter may have been troubled by the fact that the sponsor’s purpose in funding the research was to affect a particular legal determination in a case to which the sponsor was a party. Exxon made no secret of the fact that the reason it was seeking out researchers to conduct empirical studies on jury arbitrariness was to support its efforts to set aside a massive punitive damages award. Except for the fact that the research was to be used for an appeal, it was, from the sponsor’s perspective, indistinguishable from expert testimony prepared by a consultant for a trial. But this fact alone may have been a sufficient rationale for Justice Souter’s footnote. The research was not subject to the discovery that attends commissioned expert testimony. The authors did not have to produce the documents upon which they relied, and they were not subject to cross-examination. The results of the research were not judicially noticeable facts because they were not “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Indeed, they received withering criticism from several prominent legal academics. More to the point, the accuracy of this research could “reasonably be questioned” for the simple reason that it was commissioned for the purpose of affecting the judicial resolution of the legal issue for which it was to be cited. The unfairness inherent in citing as academic learning research that a party to the proceeding funded for the purpose of providing a particular slant on that academic learning is, in my view, a sufficient reason for a judge to decline to rely on it.

The most plausible interpretation of Justice Souter’s terse footnote, in other words, is that he declined to rely on the Exxon-sponsored research not out of his assessment of the academic integrity of that research, but out of a legitimate concern for the integrity of the appellate process. The Federal Rules of Appellate Procedure provide well-defined procedures for parties and their attorneys to follow in attempting to influence an appellate court. One of the functions of these rules is to protect the integrity of the appellate process by ensuring that the judges are not swayed by extrajudicial attempts by the parties to influence their thinking on issues relevant to the appeal. If the attorney that contacted Professor Freudenberg accurately related the purpose of the Exxon-sponsored research, it was commissioned precisely for that reason. The Court could not prevent a party or the author of an amicus curiae brief from bringing the research to its attention, but the Court could protect the integrity of the appellate process by declining to rely on it.

One might similarly approach the academic integrity of sponsored research from the perspective of the academic discipline, rather than from the perspective of the individual researcher. It is certainly appropriate for an

171. Fed. R. Evid. 201(b)(2).
172. See supra text accompanying notes 38-46.
academic to prepare and defend expert testimony in court for a fee. In that context, the academic provides his or her expert opinion to a particular audience (the judge or the jury) for the well-understood purpose of affecting the outcome of the proceeding. The audience is well aware of both the reason for the testimony and of the fact that the academic received payment for providing it, and there is ordinarily an expert on the other side testifying for a fee to the same audience for the same purpose. When a sponsor commissions research for the purpose of citation in an “academic journal, preferably a quite prestigious one,” the sponsor’s ultimate audience may be a judge or policymaker, but its immediate audience is the academic community that it hopes will accept the research as part of the general corpus of knowledge in the relevant discipline. One might legitimately question whether research commissioned under such circumstances is consistent with the integrity of the academic discipline, even if the provenance of the research is clear on its face. If the academic enterprise is ultimately a quest for truth and understanding, it should not be receptive to attempts by outsiders to steer the direction of that quest to their ideological or economic advantage.

The Exxon-funded punitive damages research is therefore troubling from the perspective of the integrity of the law and economics discipline. Had the academic journals and the university presses that published the research been aware of both the provenance and the narrow pecuniary purpose of its sponsor, they arguably should have declined to publish it out of respect for the integrity of the discipline, just as Justice Souter declined to rely on it out of respect for the integrity of the appellate proceeding. Similarly, as members of the academic discipline, the scholars who conducted and published the research should have, out of respect for the integrity of the discipline, declined to accept Exxon’s support at the outset.

The generous funding that the Olin Foundation and others provided to the law and economics programs at elite law schools was part of a broader attempt by the sponsors to affect the outcome of a larger policy debate over the proper roles of the government and the market. Their efforts undoubtedly had an impact on the research agendas at those schools. Scholars needing summer support and possessing relevant expertise in economics could depend upon support and research assistance for projects that came within the research parameters of the law and economics centers associated with those law schools. The foundations and corporate sponsors of law and economics publications like the *Journal of Law and Economics* and the *Journal of Legal Studies* also had an impact on the broader research agenda of legal academia by offering law and economics scholars publication opportunities that they might not otherwise have had if they had been limited to the traditional student-run law reviews.

At the same time, the impact of the additional funding from Olin and others on the corpus of academic learning was not as direct and immediate as the

173. Freudenburg, supra note 17, at 14.
impact of the Exxon-funded research. Ronald Coase was going to pursue his project of protecting neoclassical economics from Pigouvian welfare economics, whether or not the Olin Foundation supported law and economics at the University of Chicago. Likewise, Richard Posner and George Priest were going to defend traditional negligence from the advocates of strict products liability with or without funding from the foundations and corporate sponsors that supported their programs. The funding gave them the resources to devote more time to their projects and to increase their visibility in academia, but the source of the funding did not undermine the academic integrity of their scholarship. Nor did it prevent other scholars from refuting their conclusions or from steering law and economics away from the narrow path that Olin and the other sponsors envisioned.

Still, the effort to affect the corpus of academic learning for the purpose of advancing a broad ideological and economic agenda does raise troubling questions from the perspective of the academic integrity of the discipline. Should an institution accept terminable support from an organization with an agenda that does not correspond to the academic search for truth? Should an academic institution allow its research agenda or that of its research faculty to be indirectly driven by outsiders with an ideological or financial agenda? Is the institution’s assurance that it will shield individual researchers from outside influences a sufficient response for academics in the discipline at other institutions? Scholars concerned with the academic integrity of the discipline may have legitimate concerns about the research products of institutions that appear to be willing to sell their academic reputations for a fee. Yet, the relationship between sponsor and institution is never that crude. Therefore, the answers to these questions will depend upon the precise nature of the arrangements, both tacit and explicit, between the institutions and the sponsors, and that is a topic that is extremely context dependent.

The undeniable success of the law and economics movement, which, in the opinion of many academics, became the dominant force in legal education for many years, suggests that the efforts of the Olin Foundation and others to guide the research agendas of several elite law schools were singularly successful. It is, of course, possible that law and economics would have achieved the same status in legal academia without the support of the foundations and corporations that have so generously supported it through the years. I am, however, inclined to accept the assessment of the sponsors themselves who have attributed the rise of the law and economics movement to their successful efforts to establish it as a viable academic alternative to the “reign” of liberal law professors.


175. MILLER, supra note 74, at 81.
CONCLUSION

The purpose of this Article is not to condemn the scholars who accepted funding from Exxon for conducting research on punitive damages or to criticize the many Olin-sponsored law and economics centers at law schools throughout the country. I know many of the Exxon-sponsored scholars to be academics of the highest integrity, and the law and economics centers have produced much excellent empirical and theoretical research that I have found very useful in my own teaching and scholarship. I am not so naïve as to believe that the answer is for academics and academic institutions to reject all offers of sponsored research and thereby avoid the question entirely. My goal is to raise several difficult questions posed by sponsored academic research in a context other than the hard sciences, where these questions have been vigorously debated for many years. I have suggested some tentative answers to some of the questions, but I am not at all confident that they are the right answers. Indeed, the answers to the most difficult questions are context dependent and therefore demand further analysis in the particular settings in which they arise. My hope is that the thoughts expressed here will contribute to what will become an ongoing debate over how academics and academic institutions can best go about preserving the integrity of sponsored academic research.