Volume 61, Issue 3 Page 711

Stanford Law Review

PUNITIVE DAMAGES, REMUNERATED RESEARCH, AND THE LEGAL PROFESSION

Shireen A. Barday

NOTES

PUNITIVE DAMAGES, REMUNERATED RESEARCH, AND THE LEGAL PROFESSION

Shireen A. Barday*

INDEX OF FIGURES AND TABLES

INTRODUCTION

A sociology professor is sitting in his office one day when he receives an unsolicited call from a representative of a large corporation facing a devastating

* J.D., Stanford Law School, 2008.

punitive damages award. The caller says that the corporation is "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 approach." The caller explains, "[t]hen, in [the corporation's] 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."[1] The professor was William Freudenburg and the corporation was Exxon, which contacted Freudenburg and a host of other scholars in the wake of its appeal of a $5 billion punitive damages verdict arising from the Exxon Valdez oil spill off the coast of Alaska.

This practice of soliciting and then funding "for-litigation" research is not unique to Exxon. A host of other groups, including corporations and conservative think tanks with corporate underwriters, continue to fund research for the purpose of presenting their findings to courts in order to discredit jury verdicts that awarded punitive damages against them.[2] This kind of hired-gun research would be problematic even if the results were accurate, because as the Supreme Court has recently acknowledged, it creates an appearance of bias.[3] But even more troubling is the fact that prominent scholars have discredited this research by showing that numerous industry-funded law review articles are methodologically flawed.[4]

This Note expands upon the literature analyzing the problems with remunerated research by examining law review articles on the topic of punitive damages that disclose financial support. It first reviews the scope and methodology used to gather the relevant set of funded law review articles, and then highlights trends in the data, such as frequent funders and peak funding years. Next, the Note examines the treatment of funded law review articles, first by the legal profession and then by the judiciary. In assessing the treatment of such articles, this Note looks at the number of citations to particular articles, as well as the prestige of the courts citing to industry-funded pieces as compared to pieces funded by universities. In the second Part, using the

1. William R. Freudenburg, *Seeding Science, Courting Conclusions: Reexamining the Intersection of Science, Corporate Cash, and the Law*, 20 SOC. F. 3, 14 (2005).

2. *See generally* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 57-65 (describing findings in "for-litigation" studies on punitive damages).

3. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2626 n.17 (2008) ("The Court is aware 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. Because this research was funded in part by Exxon, we decline to rely on it." (internal citations omitted)). *But see* Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 n.5 (2001) (citing favorably to Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2074 (1998)).

4. *See generally* Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error, and Overreaching in Sunstein et al.'s* Punitive Damages, 53 EMORY L.J. 1359 (2004) (describing the literature critical of funded research and providing additional analysis).

Daubert standard for admissibility of expert testimony as a point of departure, the standards governing what qualifies as "authority" within the legal profession are compared and contrasted with those from other fields. Finally, this Note concludes by offering two proposals for reform: mandatory disclosure of funding sources and the creation of a database to identify articles by funding source.

I. FINANCIAL SUPPORT FOR LEGAL RESEARCH

Law professors often receive financial support for the articles they publish—by 2008, 24,300 or approximately 5.5% of law review articles included financial disclosures.[5] As many as half of the acknowledged donors are universities (or donors to universities) who exert no influence over the content of the article being published. Many universities and law schools have public relations policies in place to ensure that donors to the school are acknowledged in publications stemming from research their contributions have supported.[6] Others offer faculty a portion of their annual salary in the form of a grant to support summer research.[7] The remaining 12,000 or so pieces are funded by government, industry, and interest groups, or some combination thereof. For example, Texaco, Exxon, and Honda each funded a series of studies by sympathetic scholars in response to large punitive damages awards against them.[8] Fourteen of these types of studies have been published in law reviews.[9]

---

5. Database on file with the author. The database was compiled using Python source code extracting all entries (441,170) contained in the Westlaw "Journals and Law Reviews" database, including full-text articles. The first three footnotes and the Westlaw "cite as" field were then extracted from the articles. Articles receiving outside funding were identified using the following search terms as they appear in one of the first three footnotes in each article: (1) "research" in the same sentence as either "was supported by," "funded," or "funding"; or (2) "thank" in the same sentence as "funding" or "foundation"; or (3) "foundation" in the same sentence as "funding" or "funded"; or (4) "research" in the same sentence as "grant." "Or" in the search terms is used in both the disjunctive and conjunctive senses. Application of these search term limitations yields a database of 29,558 articles, with a false-positive error rate of less than one percent (based on random sampling).

6. *See, e.g.*, Ralph S. Brown, Jr. & John D. Fassett, *Security Tests for Maritime Workers: Due Process Under the Port Security Program*, 62 YALE L.J. 1163, 1163 n.* (1953) ("The research for this article was made possible by a grant to Yale University, in memory of Louis S. Weiss, '15, by the Louis S. Weiss Fund, Inc.").

7. *See, e.g.*, Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 529 n.* (1994) (noting support from a Cumberland School of Law summer research grant).

8. *See* Rustad, *supra* note 2, at 57-65 (discussing the studies).

9. *See* Peter Diamond, *Integrating Punishment and Efficiency Concerns in Punitive Damages for Reckless Disregard of Risks to Others*, 18 J.L. ECON. & ORG. 117 (2002) (Exxon); Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998) (National Science Foundation,

Fourteen may seem like a small sample, but these works have exerted an impact on the legal profession of substantially greater magnitude than their numbers indicate. Many have been used to reduce hundreds of millions of dollars in punitive damage verdicts assessed against some of the very corporations that have underwritten them.[10] And while the Supreme Court has recently explicitly declined to rely upon some of the studies financed by Exxon in adjudicating Exxon's appeal of the punitive damages verdict resulting from the Exxon Valdez oil spill,[11] all of these articles—including those upon which the Supreme Court has not relied—have been cited as authority by courts at every level.[12] Even the Supreme Court has previously relied upon these very articles in pronouncing rulings on punitive damages.[13] This suggests that the Supreme Court has recognized the direct conflict of interest posed by citing to literature funded by a party to the litigation but not the inherent trouble with this literature itself. Nevertheless, the influx of corporate money into legal research and jurisprudence has led some scholars to question whether industry

---

Harvard Olin Center, Exxon); Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004) (Harvard Olin Center and Exxon); Stephen Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297 (G.D. Searle & Co.); A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. LEGAL STUD. 663 (1997) (John M. Olin Program in Law and Economics at Stanford Law School); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (Exxon); Sunstein et al., *supra* note 3 (Exxon); Cass Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000) (Exxon); W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313 (2001) [hereinafter Viscusi, *Damages Mathematics*] (Sheldon Seevak Research Fund, Harvard Olin Center, Exxon); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547 (2000) [hereinafter Viscusi, *Risk Analysis*] (Sheldon Seevak Research Fund, Harvard Olin Center, Exxon); W. Kip Viscusi, *Punitive Damages: How Jurors Fail to Promote Efficiency*, 39 HARV. J. ON LEGIS. 139 (2002) [hereinafter Viscusi, *How Jurors Fail*] (Sheldon Seevak Research Fund, Harvard Olin Center, Exxon); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998) [hereinafter Viscusi, *Social Costs*] (Harvard Olin Center, Sheldon Seevak Research Fund, Exxon); W. Kip Viscusi, *Why There Is No Defense of Punitive Damages*, 87 GEO. L.J. 381 (1998) [hereinafter Viscusi, *No Defense*] (Harvard Olin Center, Sheldon Seevak Research Fund, Exxon); Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900 (1992) (John M. Olin Foundation).

10. *See generally infra* apps. A & B. For example, in *TVT Records v. Island Def Jam Music Group*, the court granted remittitur against a $108 million punitive damages award. 279 F. Supp. 2d 413, 429 (S.D.N.Y. 2003) (citing Note, *supra* note 9). In *Parks v. Wells Fargo Home Mortgage, Inc.*, the court vacated a $3 million punitive damages award. 398 F.3d 937, 943 (7th Cir. 2005) (citing Polinsky & Shavell, *supra* note 9). And in *Norcon, Inc. v. Kotowski*, the court vacated a $3.7 million punitive damages award. 971 P.2d 158, 180 n.28 (Alaska 1999) (citing Polinsky & Shavell, *supra* note 9).

11. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2626 n.17 (2008).

12. *See infra* apps. A & B (listing cases citing industry funded studies).

13. *See* Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 n.5 (2001) (citing Sunstein et al., *supra* note 3, at 2074); *see also* discussion *infra* Part I.C.

money has infiltrated the sanctity of the legal academy and begun to distort legal scholarship.[14] Professor Kip Viscusi, formerly of Harvard Law School, has been a frequent target of these charges.[15] Widely published and cited in the field of mass tort litigation, he has written extensively on the subject of punitive damages.[16] His initial work was concerned with damages arising from smokers' lawsuits against tobacco companies, but in 1997, Exxon-Mobil gave him a research grant to author articles detailing "why punitive damages awards are inappropriate in today's civil justice system."[17] At that time, Exxon was appealing a $5 billion punitive damages award, resulting from the *Exxon Valdez* oil tanker spill off the coast of Alaska.[18]

A. *Methodology for Analyzing Law Review Articles on Punitive Damages*

The data used in this Note are limited to funded research published in law reviews and other legal journals. Although this data set does not capture the full range of research underwritten by corporations, the law review is an appropriate medium for analysis because it occupies such a unique and central place in legal scholarship and research. The Supreme Court cited to law review articles as early as 1897.[19] In 1900, a *Harvard Law Review* article became the first such piece to be cited in a majority opinion.[20] During the twentieth century, Justices Brandeis and Cardozo drew heavily from law reviews in

14. *See* Vidmar, *supra* note 4 (describing the methodological problems with Exxon-funded research); *see also* Freudenburg, *supra* note 1 (describing the ways that Exxon influenced the author's own research). Although Exxon remained unnamed as the central corporation in Freudenburg's piece, he has never disputed articles by others naming Exxon as the corporation about which he wrote. He has stated with reference to the article, "What Exxon was trying to do was shape the academic literature." Tony Mauro, *Souter Causes Stir With Footnote in 'Exxon' Case*, LEGAL TIMES, July 8, 2008, http://www.law.com/jsp/article.jsp?id=1202422809951. For a discussion of Viscusi's extensive publications, see David A. Hoffman & Michael P. O'Shea, *Can Law and Economics Be Both Practical and Principled?*, 53 ALA. L. REV. 335, 395-98 (2002).

15. *See, e.g.*, Vidmar, *supra* note 4, at 1402-03; Alan Zarembo, *Funding Studies to Suit Need*, L.A. TIMES, Dec. 3, 2003, at A20.

16. *See, e.g.*, Viscusi, *Damages Mathematics*, *supra* note 9; Viscusi, *How Jurors Fail*, *supra* note 9; Viscusi, *Social Costs*, *supra* note 9.

17. Richard Lippitt, Note, *Intellectual Honesty, Industry and Interest Sponsored Professorial Works, and Full Disclosure: Is the Viewpoint Earning the Money, or Is the Money Earning the Viewpoint?*, 47 WAYNE L. REV. 1075, 1087 (2001).

18. Elizabeth Amon, *Exxon Bankrolls Critics of Punitives, Then It Cites the Research in Appeal of $5.3 Billion Valdez Award*, NAT'L L.J., May 17, 1999, at A1.

19. *See, e.g.*, United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 350 n.1 (1897) (White, J., dissenting) (citing Amasa M. Eaton, *On Contracts in Restraint of Trade*, 4 HARV. L. REV. 128, 129 (1890)).

20. *See* Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 665 (1998). The first Supreme Court majority opinion to cite to a law review was *Chicago, Milwaukee & St. Paul Railway Co. v. Clark*, 178 U.S. 353, 365 (1900), which cited James Barr Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515, 521 (1899). *See* McClintock, *supra*, at 665.

drafting opinions.[21] Indeed, recognizing the unique influence of the law review as an institution, Justice Brandeis himself underwrote most, if not all, of the articles published in the *Harvard Law Review* by students of then-Harvard Law Professor Felix Frankfurter.[22] These were written pursuant to "recommendations" of appropriate topics by Justice Brandeis, and they constituted the majority of articles he later cited in his judicial opinions.[23]

The articles analyzed for the purposes of this Note were first identified by using a Westlaw query to isolate articles in the "journals and law reviews" database that are either entirely or substantially about punitive damages where the author acknowledged funding from outside sources.[24] This list was then crosschecked against a subdirectory of all privately funded law review articles contained within the Westlaw database, yielding fifty-one articles. Then eighteen documents that either were not actually about punitive damages or did not actually include a financial disclosure were excluded as false positives.[25] The remaining thirty-three articles were classified first according to the position proffered with regards to reducing or otherwise limiting punitive damages, and second as to whether the outside funding cited by the author originated from a university or some other source.

Finally, the articles were tracked using Westlaw's "KeyCite" feature, which identifies the number of citations and types of documents citing to a particular article.[26] For the purposes of this Note, the number of references to a particular article includes citations that have appeared in judicial opinions, briefs, and miscellaneous secondary sources, including treatises and other law review articles.

---

21. Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 27-28 (1996). *See generally* Chester A. Newland, *Legal Periodicals and the United States Supreme Court*, 3 MIDWEST J. POL. SCI. 58 (1959).

22. BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 84-88 (1982).

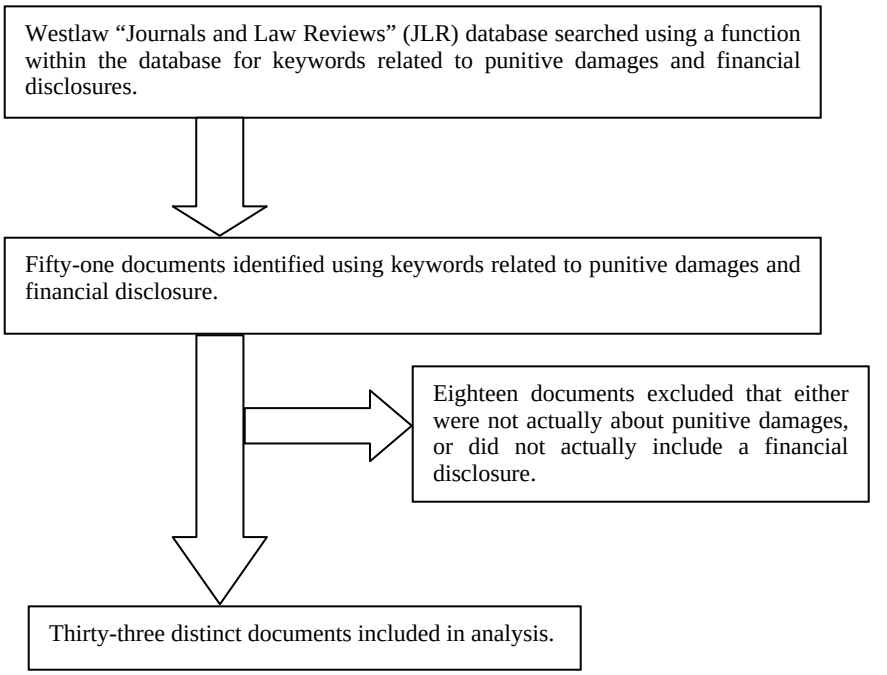
23. *Id.*

24. The precise search terms were: ti("punitive damages" "punitive damage") or pr("punitive damages" "punitive damage") & (research /s "was supported by") (research /s funded) (research /s funding) (thank /s funding) (thank /s foundation) (funding /s foundation) (funded /s foundation) (research /s grant).

25. *See supra* note 5.

26. KeyCite, http://www.westlaw.com/ (follow "KeyCite" hyperlink) (last visited Oct. 8, 2008).

Figure 1. Article Identification Flowchart



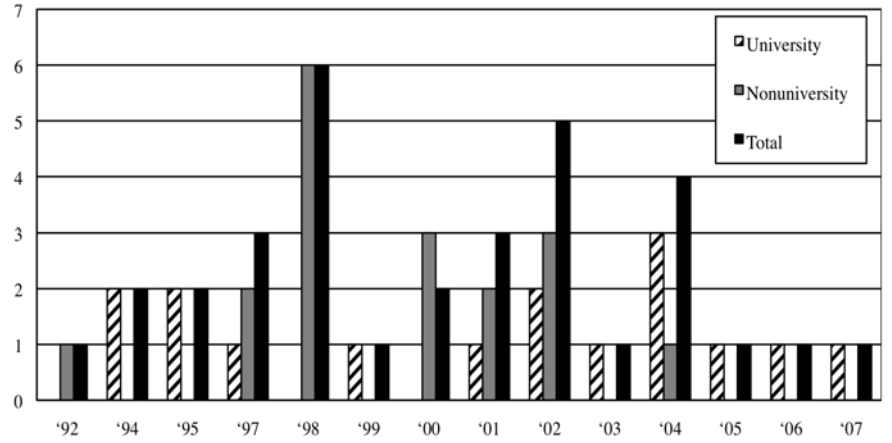
This Note includes articles that disclose grants by universities, because they serve as a useful benchmark against which to compare research arising from other funding sources. "University sources" include any funds originating in the school's endowment that did not condition release of funds upon the university's approval of the specific research project (i.e., that did not require a grant proposal or vetting process). "University funding" does not include organizations like the Harvard Olin Center or the John M. Olin Program in Law and Economics at Stanford, both of which have full discretion (separate and apart from the university) over which research projects they fund. Unlike corporate and think tank underwriters, university grants do not raise serious questions as to the quality of the research because scholars have full control over their own work and do not depend on anyone else's decision to provide funding. The bulk of the analysis in this essay, therefore, focuses on nonuniversity sources, ranging from the Harvard Olin Center to the Exxon Corporation. Accordingly, university sources tend to appear in aggregate, with nonuniversity sources listed by specific organization.

B. *Trends in Law Review Articles on Punitive Damages*

The thirty-three articles culled by the methodology detailed above span the years 1992 to 2007, with three peaks occurring in 1998, 2002, and 2004. Most (twenty-one articles) were published between 1998 and 2004. Slightly fewer

than half of the articles—sixteen out of the thirty-three—were financed in whole or in part by university grants, including summer research grants.[27] All but one of the nonuniversity-funded pieces were published between 1997 and 2002.[28]

Figure 2. Financial Disclosures by Year by Type



27. *See, e.g.*, Jim Gash, *Punitive Damages, Other Acts Evidence, and the Constitution*, 2004 UTAH L. REV. 1191, 1191 n.* (thanking Pepperdine University School of Law for "funding this Article through a research grant"); John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton, Inc., 38 HARV. INT'L L.J. 59, 59 n.* (1997) (thanking Villanova University School of Law for "funding this project with a summer research grant").

28. One nonuniversity-funded piece was unclassifiable as either for or against punitive damages, because it was a summary of remarks from a conference at Harvard University. *See* Robert A. Klinck, *The Punitive Damage Debate*, 38 HARV. J. ON LEGIS. 469, 469 n.* (2001) (thanking the Center for Legal Policy at the Manhattan Institute, Exxon Mobil, Lexis Publishing, Ropes & Gray LLP, and Barbri for underwriting the symposium). Accordingly, this piece has been omitted from these rankings. It appears, however, in all overall tabulations of nonuniversity-funded research. The remaining fourteen articles are Diamond, *supra* note 9 (Exxon); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) [hereinafter Eisenberg et al., *Juries*] (Bureau of Justice Statistics); Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997) [hereinafter Eisenberg et al., *Predictability*] (Bureau of Justice Statistics); Hastie & Viscusi, *supra* note 9 (National Science Foundation, Harvard Olin Center, Exxon); Hersch & Viscusi, *supra* note 9 (Harvard Olin Center and Exxon); Landsman et al., *supra* note 9 (G.D. Searle and Co.); Polinsky, *supra* note 9 (John M. Olin Program in Law and Economics at Stanford); Polinsky & Shavell, *supra* note 9 (Exxon); Sunstein et al., *supra* note 3 (Exxon); Sunstein et al., *Deterrence*, *supra* note 9 (Exxon); Viscusi, *Damages Mathematics*, *supra* note 9 (Sheldon Seevak Research Fund, Harvard Olin Center, Exxon); Viscusi, *Risk Analysis*, *supra* note 9 (Sheldon Seevak Research Fund, Harvard Olin Center, Exxon); Viscusi, *How Jurors Fail*, *supra* note 9 (Sheldon Seevak Research Fund, Harvard Olin Center, Exxon); Viscusi, *Social Costs*, *supra* note 9 (Harvard Olin Center, Sheldon Seevak Research Fund, Exxon); Viscusi, *No Defense*, *supra* note 9 (Harvard Olin Center, Sheldon Seevak Research Fund, Exxon); and Note, *supra* note 9 (John M. Olin Foundation).

Among nonuniversity donors, the most common funders were the Exxon Corporation (which financed one-third of all articles), the Harvard Olin Center,[29] and the Sheldon Seevak Research Fund.[30] In fact, there was a profound lack of diversity among corporate underwriters, though it is possible that additional corporations donated money to programs or foundations that subsequently took the credit for underwriting articles. There were only two industry funders for law review articles: Exxon and G.D. Searle & Co., a pharmaceutical company troubled by a history of products liability suits and punitive damages verdicts.[31]

Table 1. Law Review Articles by Funder

Funder	Articles
Bureau of Justice Statistics	2
Exxon Corporation	13
G.D. Searle & Co.	1
Harvard Olin Center	7
John M. Olin Foundation	1
John M. Olin Program at Stanford[32]	1
National Science Foundation	1
National Bureau of Economic Research	2
Sheldon Seevak Research Fund	5

Table 2. Exxon-Funded Articles

Year	Exxon-Funded Articles
1998	5
2000	3
2001	1
2002	2
2004	1
Total	*11*

29. The Harvard Olin Center, along with the various other centers and programs bearing the Olin name, was established by a grant from the John M. Olin Foundation, which disbursed funding to think tanks, media outlets and law and economics programs at influential universities. The John M. Olin Center for Law, Economics, and Business, http://www.law.harvard.edu/programs/olin_center/ (last visited Nov. 8, 2008).

30. The Sheldon Seevak Research Fund was established at Harvard to support empirical legal studies. *See* E-mail from Amy Nickens, Program and Publications Manager, Vanderbilt University Ph.D. Program in Law and Economics, to Shireen A. Barday (Apr. 8, 2008) (on file with author).

31. *See* Julia Flynn Siler, *Searle Looks a Lot Riskier Now*, N.Y. TIMES, Sept. 15, 1988, at D1 (noting a recent $8.75 million punitive damages award to a woman hurt by Searle's Copper-7 intrauterine birth-control device, one of more than 1300 lawsuits over the product).

32. The Harvard Olin Center, John M. Olin Foundation, and John M. Olin Program at Stanford are treated separately because while funding for all three originated with the John M. Olin Foundation itself, each has a separate board for reviewing research proposals.

University-funded law review articles overwhelmingly defended punitive damages and jury awards, with only three articles (or 19 percent) addressing ways to limit judgments.[33] Of the two nonuniversity-funded articles not critical of punitive damages in some way, Theodore Eisenberg was an author of both, and he received remuneration only from the Bureau of Justice Statistics, which is a component of the Office of Justice Programs within the United States Department of Justice.[34]

Many of Exxon's authors were repeat players. A. Mitchell Polinsky (two articles), Cass Sunstein (two articles), and W. Kip Viscusi (five articles) each wrote more than one article, though not all of the articles they wrote were remunerated by Exxon.[35] In fact, the articles written by these individuals comprise 69 percent of the total nonuniversity-funded articles, and the pieces written by Viscusi alone comprise almost one-third of the total nonuniversity-funded articles.[36] The Exxon Corporation underwrote at least some of the articles written by each repeat player on the nonuniversity side.[37]

C. *Treatment of Funded Articles by the Legal Profession*

At all levels of the legal profession, university-funded research about punitive damages fares substantially worse than nonuniversity-funded pieces on the subject, as measured by number of citations by the courts. Of the sixteen university-funded articles, only three were cited in cases and each one was cited in only a single case.[38] The Supreme Court cited none, one federal district

---

33. The three university-funded articles addressing ways to limit judgments are Alan Calnan, *Ending the Punitive Damage Debate*, 45 DEPAUL L. REV. 101 (1995); Lisa Litwiller, *From* Exxon *to* Engle*: The Futility of Assessing Punitive Damages as Against Corporate Entitles*, 57 RUTGERS L. REV. 301 (2004); and Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007).

34. The two nonuniversity-funded articles not critical of punitive damages are Eisenberg et al., *Juries*, *supra* note 28; and Eisenberg et al., *Predictability*, *supra* note 28.

35. For the sake of classifying authors, I have included only the first author listed for any given article, because the first author is generally the architect and/or primary contributor to the research. There is some indication that this holds true with the sample of work on punitive damages. *See, e.g.*, Landsman et al., *supra* note 9, at 342 n.* ("Authorship is alphabetical, but for the person who superintended the writing of the Article, whose name occupies the lead position.").

36. These articles are Viscusi, *Damages Mathematics*, *supra* note 9; Viscusi, *Risk Analysis*, *supra* note 9; Viscusi, *How Jurors Fail*, *supra* note 9; Viscusi, *Social Costs*, *supra* note 9; and Viscusi, *No Defense*, *supra* note 9.

37. These articles are Diamond, *supra* note 9; Hersch & Viscusi, *supra* note 9; Polinsky & Shavell, *supra* note 9; Sunstein et al., *Cognition*, *supra* note 3; Sunstein et al., *Deterrence*, *supra* note 9; Viscusi, *Risk Analysis*, *supra* note 9; Viscusi, *Damages Mathematics*, *supra* note 9; and Viscusi, *How Jurors Fail*, *supra* note 9.

38. These articles are Calnan, *supra* note 33 (cited in Farmland Mutual Insurance Co. v. Johnson, 36 S.W.3d 368 (Ky. 2001)); Gotanda, *supra* note 27 (cited in In re Cudd Pressure Control, Inc., No. Civ.A. 98-585, 1999 WL 820551, at *1 (E.D. La. Oct. 13, 1999)); Ware, *supra* note 7 (cited in Davis v. Prudential Secs., Inc., 59 F.3d 1186, 1192 (11th Cir.

court cited one, and one federal appellate court cited another.[39] Courts' lack of attention to these articles reflects the lack of attention lawyers pay to these pieces; only eleven have been cited in briefs, and only four were cited more than twice.[40]

Table 3. Articles by Funding Type

Total Cases Citing[41]	Articles	University-Funded	Nonuniversity-Funded	Exxon-Funded
0	25	13	12	9
1-2	6	3	4	1
7	1	0	1	1
13	1	0	1	1
Total	*34*	*16*	*18*	*12*

Table 4. Articles by Funding Type by Citations in Legal Briefs

Total Briefs Citing[42]	Articles	University-Funded	Nonuniversity-Funded	Exxon-Funded
0	8	5	3	2
1-5	22	11	10	6
6-20	0	0	2	1
21-49	2	0	2	2
x > 50	1	0	1	1
Total	*34*	*16*	*18*	*12*

By contrast, nonuniversity pieces fared much better. Five nonuniversity-funded articles have been cited in opinions a total of twenty-five times.[43] The Supreme Court has twice referred to such articles,[44] and federal appellate and

1995)).

39. *See* cases cited *supra* note 38.

40. The four are Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002) (3 briefs); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003) (4 briefs); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida:* In Terrorem *and in Reality*, 38 HARV. J. ON LEGIS. 487 (2001) (5 briefs); and Ware, *supra* note 7 (4 briefs). These data (and the underlying briefs) were located through Westlaw using the "Citing References" tool.

41. "Case Citing" indicates the number of independent cases citing to a particular article, regardless of the number of times each case cites the article.

42. "Briefs Citing" indicates the number of independent briefs citing to a particular article regardless of the number of times each brief cites to the specific article.

43. These five are Eisenberg et al., *Predictability*, *supra* note 28 (1 case); Landsman et al., *supra* note 9 (2 cases); Polinsky & Shavell, *supra* note 9 (13 cases); Sunstein et al., *Deterrence*, *supra* note 9 (7 cases); and Note, *supra* note 9 (2 cases). *See also infra* apps. A & B.

44. These two are Polinsky & Shavell, *supra* note 9 (cited in *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 438-39 (2001)); and Sunstein et al., *supra* note 3

district courts have each referred to them six times.[45] In addition, thirteen have been cited in briefs, for more than one hundred citations in aggregate.[46]

The difference between nonuniversity-funded articles and others is presumably the result of the relative obsolescence of the law review in litigation. For example, lawyers infrequently rely upon law review articles as a source of authority in briefs and other trial documents.[47] Industry-funded work is an exception, because attorneys representing corporations that underwrote research will be aware of the studies. In addition, the resulting articles will be precisely on point for the practitioners, since corporations will presumably only fund articles believed to maximize the welfare of the corporation. In fact, to the extent that corporations have a duty to shareholders to act in the best interests of the corporation, it could be said that the corporate funders may not underwrite research that undermines the corporate interest because such research would represent a breach of the fiduciary duty the corporation owes to its shareholders. University-funded pieces, on the other hand, are unlikely to be tailored to the needs of litigators, as they are unlikely to have been produced in connection with any litigation or with the same constraints as corporate funded pieces.

Of the nonuniversity-funded articles, those funded by the Exxon Corporation have fared particularly well. Although courts only cited two of its funded articles, the Supreme Court cited both, and nine others were cited in briefs.[48] Of those cited in briefs, six were cited in cases involving Exxon,[49] and eight were cited in conjunction with *State Farm Mutual Automobile Insurance Co. v. Campbell*, a seminal case limiting punitive damages.[50] Thus Exxon-

---

(cited in *Cooper Indus.*, 532 U.S. at 432 n.5).

45. *See infra* apps. A & B.

46. These articles are Eisenberg et al., *Juries*, *supra* note 28 (5 briefs); Eisenberg et al., *Predictability*, *supra* note 28 (9 briefs); Hastie & Viscusi, *supra* note 9 (4 briefs); Hersch & Viscusi, *supra* note 9 (4 briefs); Landsman et al., *supra* note 9 (5 briefs); Polinsky, *supra* note 9 (4 briefs); Polinsky & Shavell, *supra* note 9 (64 briefs); Sunstein et al., *Deterrence*, *supra* note 9 (4 briefs); Viscusi, *Damages Mathematics*, *supra* note 9 (5 briefs); Viscusi, *Risk Analysis*, *supra* note 9 (21 briefs); Viscusi, *Social Costs*, *supra* note 9 (25 briefs); Viscusi, *No Defense*, *supra* note 9 (3 briefs); and Note, *supra* note 9 (4 briefs).

47. *See* Max Stier et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1484-85 (1992) (providing survey results regarding law review usage by attorneys).

48. *See infra* apps. A & B.

49. These citations in briefs are as follows: Brief of Product Liability Advisory Council as Amicus Curiae in Support of Petitioners at 10, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) (No. 07-219), 2007 WL 4618319; (citing Sunstein et al., *supra* note 3; and Polinsky & Shavell, *supra* note 9); Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 24, *Exxon Shipping Co.*, 128 S. Ct. 2605 (No. 07-219), 2007 WL 4618317 (citing Viscusi, *Damages Mathematics*, *supra* note 9; and Sunstein et al., *Deterrence*, *supra* note 9); *id.* at 25 (citing Viscusi, *Risk Analysis*, *supra* note 9).

50. 538 U.S. 408 (2003). *See generally* Brief of Certain Leading Business Corporations as Amici Curiae in Support of Petitioner, *State Farm*, 538 U.S. 408 (No. 01-1289) (citing Hastie & Viscusi, *supra* note 9; Polinsky & Shavell, *supra* note 9; Sunstein et

funded articles have been used as both direct support in Exxon litigation and as support in other cases seeking to limit punitive damage awards. When Exxon cites to its own research in briefs, it makes no mention that it has funded the research. Instead, Exxon attorneys simply state, for example, that "these articles present recent social science research demonstrating that jurors are generally incapable of performing the tasks the law assigns to them in punitive damage cases."[51] Not surprisingly, courts have adopted many of Exxon's funded findings as fact; district and appellate courts have referred to these articles a total of twelve times.[52]

These data indicate that overall courts have been wont to cite industry-funded research. They do not, however, encapsulate the full extent of the influence of industry remuneration. The Supreme Court, for example, which has recently declined to rely directly upon Exxon-funded research,[53] has indirectly relied upon Exxon-funded research in several seminal cases. In *State Farm*, for example, the Court overturned a $145 million judgment against State Farm, remanding the case to state court for reconsideration of the punitive damages award.[54] The petitioner's brief in that case cited an Exxon-funded article that had been published in the *Harvard Law Review*, namely A. Mitchell Polinsky and Steven Shavell's *Punitive Damages: An Economic Analysis*.[55] The brief used the article as support for its argument that punitive damages were unnecessary in *State Farm* because compensatory damages achieved optimal deterrence of future tortious activity.[56] Although the Supreme Court did not cite this article in its opinion, it held that $145 million in punitive damages was excessive in part because the parties failed to show that punitive damages would deter future bad conduct.[57] This was precisely the argument Polinsky and Shavell had advanced. Examples such as this are nonquantifiable

---

al., *supra* note 3; Sunstein et al., *Deterrence*, *supra* note 9; Viscusi, *Damages Mathematics*, *supra* note 9; Viscusi, *No Defense*, *supra* note 9; Viscusi, *Risk Analysis*, *supra* note 9; Viscusi, *Social Costs*, *supra* note 9).

51. Freudenburg, *supra* note 1, at 24 (citation omitted).

52. *See generally infra* apps. A & B.

53. *See supra* note 11 and accompanying text.

54. 538 U.S. at 429.

55. Brief for Petitioner at 31 n.30, *State Farm*, 538 U.S. 408 (No. 01-1289), 2002 WL 1968000 (citing Polinsky & Shavell, *supra* note 9). The other brief that cited Polinsky & Shavell was Brief Amici Curiae of Certain Leading Social Scientists and Legal Scholars in Support of Respondents at 5 n.14, *State Farm*, 538 U.S. 408 (No. 01-1289), 2002 WL 31409923.

56. Brief for Petitioner, *supra* note 55, at 31 n.30 ("In the instant case, the Utah Supreme Court erroneously seized upon a multiplier based on testimony regarding a broad category of various first-party claims handling practices not at issue in the Campbell case. In fact, under standard economic deterrence theories, no punitive damages at all would be warranted for deterrence in cases such as this . . . .").

57. *State Farm*, 538 U.S. at 427 ("With respect to the Utah Supreme Court's second justification, the Campbells' inability to direct us to testimony demonstrating harm to the people of Utah (other than those directly involved in this case) indicates that the adverse effect on the State's general population was in fact minor.").

in part because courts almost never acknowledge industry funding when they rely on underwritten research. Such illustrations, however, demonstrate the influence and reach of industry-funded research and make clear the subtle and indirect ways that industry-funded research exerts an impact on legal doctrinal development. They also reveal the need to ensure that there are checks and balances on the accuracy and validity of the work financed by corporations and other interest groups given the potentially broad impact such work may have.

II. THE TROUBLE WITH REMUNERATED RESEARCH

The data would not necessarily indicate a problem if industry-funded research were verified prior to publication, but it is not. The research described in this Note was published in non-peer-reviewed journals and republished in one non-peer-reviewed book. As a result, at least some of the industry-funded works may be flawed despite having been published. For example, *Punitive Damages: How Juries Decide* is a book-length collection containing many previously published law review articles, all of which were underwritten by Exxon, other major corporations, and conservative foundations.[58] Although the book boasts many accomplished authors, including Cass Sunstein, Kip Viscusi, and Reid Hastie, scholars have criticized it for faulty methodology.[59] Critiques include problems bearing on the "ecological validity" of the Exxon-funded authors' conclusions, which arise from deficiently simulated "trial" conditions.[60] Despite such errors that critics have highlighted as fatal, *Punitive Damages* was quickly championed by Exxon and like-minded corporations and presented to the courts in ongoing litigation.[61]

Key courts have accepted the conclusions drawn by the authors of *Punitive Damages*. In several opinions, high-level courts have explicitly cited *Punitive Damages* as well as the articles on which it was based. For example, the Supreme Court cited an article by *Punitive Damages* author Cass Sunstein in a case concerning the standard of review for punitive damages awards.[62] One

58. In the preface of *Punitive Damages*, the authors "gratefully acknowledge" the financial support of ExxonMobil Corporation, the National Science Foundation, the Law and Economics Program at the University of Chicago, and the Olin Foundation. *See* SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE ix (2002).

59. *See, e.g.*, Vidmar, *supra* note 4, at 1359-60 (describing the book as raising "serious methodological problems bearing on the validity of the research and, therefore, its ability to provide judges and legislators with useful information about juries and punitive damages").

60. *Id.* at 1364.

61. Zarembo, *supra* note 15 (stating that "Exxon research" has provided "ammunition" to "industry leaders [who] live in fear of large awards and often campaign against them"); *see also id.* (noting that this "Exxon-funded research" was repeatedly cited by leading corporations who filed a brief in the *State Farm* case and that it was countered by twenty-one academics who made a "lengthy attack on the studies" contained in the book).

62. *See* Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 n.5 (2001) (citing Sunstein et al., *supra* note 3).

year later, a federal judge in New York referred to the book itself as "a pathbreaking empirical multidisciplinary study," stating that it provided conclusive evidence that "we can expect relatively uniform assessments of compensatory damages in tobacco cases, but widely variant damages that will be appreciably higher when awarded by local juries than by juries in a national class action."[63] Then, in *TVT Records v. Island Def Jam Music Group*, a court quoted one of the *Punitive Damages* articles as objective social science supporting the propositions that perspectives on the utility of punitive damages are widely varied, that punitive damages are "out of control," and that risks of high awards have led to overly cautious (and economically inefficient) activity by corporations.[64] None of these cases ever acknowledged that the cited author(s) had received remuneration for their work or noted that the research was produced in connection with litigation when that was the case.

Even when the funders are not involved in the particular lawsuit in which their research is cited, they benefit from a shift in precedent. For example, whenever cases cite to Exxon-funded research as authority on the question of reducing punitive damages, Exxon can then cite to these cases as authority that punitive damages should be reduced in its own case. For example, in *Cooper Industries v. Leatherman Tool Group*, the Supreme Court cited to *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, which was funded by the Exxon Corporation.[65] Though Exxon was not involved in *Leatherman*, it cited to the case in its own appeals to argue that the punitive damages award entered against it was excessive.[66] Without requiring that studies be authenticated or validated, courts that rely upon corporate research as objective authority open the door to shoddy methodology by telling would-be authors that the quality of their work will never be second-guessed—regardless of the role of their corporate underwriters.

A. Daubert *and Judicial Scrutiny of Industry-Funded Scientific Studies*

The blinkered approach of courts to industry-funded research is surprising given judicial scrutiny of industry-funded research offered as scientific evidence under the *Daubert* standard. Although industry-funded research on punitive damages is not used as evidence during trial, which would require it to meet threshold standards of reliability, it is nevertheless presented to appellate courts as "evidence" of the underlying assertions contained within the research. That is, the punitive damages research functions as evidence in two respects.

63. *In re* Simon II Litig., 211 F.R.D. 86, 106 (2002) (Weinstein, J.).

64. 279 F. Supp. 2d 413, 418 n.5, 426 n.18 (S.D.N.Y. 2002) (citing Sunstein et al., *supra* note 3).

65. 532 U.S. at 432 n.5.

66. *See* Reply Brief in Support of Petition for Writ of Certiorari at 8, Exxon Shipping Co. v. Baker, 128 S. Ct. 1183 (2008) (No. 07-219), 2007 WL 3000779 (citing *Cooper Indus.*, 532 U.S. 424).

First, although the largely empirical research is cited in appellate briefs as part of parties' "legal arguments," it is presented as a substantive matter of fact. In the case of Exxon, studies proffering that juries are irrational and therefore unfit decision makers were presented during the appeals process as actual evidence of the fact that juries are indeed poor decision makers for the kinds of issues presented in that case.[67] Second, the research tends to appear before appellate courts for the first time in any given case in order to bolster a new and collateral argument, which makes the use of the research akin to the use of evidence at trial even though it is used as part of a "legal argument." *Exxon* is again illustrative. In *Exxon*, the issue at the heart of the case was whether punitive damages should be awarded and, if so, then in what amount.[68] The studies Exxon underwrote for publication in law reviews did not address this question but rather focused on whether juries were fit to assess punitive damages at all. The research therefore provided a basis for a collateral attack on the jury without ever directly addressing the question of punitive damages itself.

Because funded research tends to serve an evidentiary-like function, the *Daubert* standard is apposite, especially since *Daubert* also dealt with litigant-funded work. After all, it would make little sense to apply rigorous standards to determine the fitness of particular scientific evidence at the trial level, standards that are necessary because of the presumption of bias in litigant-funded research, but to allow material that would have been deemed unfit by the trial court (because it was funded by litigants and unverified) to enter into the decision-making metric at the appellate level for the purpose of undermining a jury verdict based upon other evidence that met a baseline indicia of reliability in the first place.

In *Daubert v. Merrell Dow Pharmaceuticals*, the seminal case on the admissibility of expert scientific testimony, Judge Kozinski famously considered the corrupting influence of money on expert testimony, wondering whether a "bias[] toward a particular conclusion by the promise of remuneration" would always and necessarily outweigh its reliability.[69] In the

67. *See* Brief of Product Liability Advisory Council as Amicus Curiae in Support of Petitioners, *supra* note 49, at 10 (arguing that punitive damage awards are "inherently dangerous to the public where, as here, the corporate defendant is engaged in socially beneficial, albeit inherently risky behavior" and citing to Sunstein et al., *supra* note 3).

68. The precise question presented to the Supreme Court as phrased by Exxon was: "Is this $2.5 billion punitive damages award, which is larger than the *total* of all punitive damages awards affirmed by all federal appellate courts in our history, within the limits allowed by (1) federal maritime law or (2) if maritime law could permit such an award, constitutional due process?" Petition for Writ of Certiorari at i, *Exxon Shipping Co.*, 128 S. Ct. 2605 (2008) (No. 07-219), 2007 WL 2383784.

69. 43 F.3d 1311, 1317 (9th Cir. 1995) ("One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying.").

Daubert case, the plaintiffs provided a group of experts alleging a connection between Bendectin (defendant-manufacturer's drug) and birth defects on the basis of similarities between Bendectin's chemical structure and other drugs suspected of causing birth defects.[70] The Ninth Circuit concluded that testimony, like that of plaintiffs' experts, "not based on independent research" could only be admitted if "the party proffering it . . . [came] forward with other objective, verifiable evidence that the testimony [was] based on 'scientifically valid principles.'"[71] The court then suggested that such evidence would usually include peer review and publication—the *sine qua non* of "sound methodology" in the scientific arena.[72]

Under a literal reading of the evidentiary standard elaborated by Judge Kozinski in *Daubert*, most if not all of the research financed by Exxon should be inadmissible as evidence at the trial level. Neither *Punitive Damages* nor its antecessors were peer reviewed prior to publication, nor were any subsequently published in peer-reviewed journals. Most of the underlying articles were published in student-edited law reviews, which Judge Richard Posner and others have criticized as poor gatekeepers for legal scholarship.[73] The remainder of the articles in *Punitive Damages* were published in the *Journal of Legal Studies*, sponsored by the University of Chicago.[74] Although the *Journal of Legal Studies* is not student-run, it nonetheless does not follow a traditional "blind" peer review process.[75] Rather, one or both of the journal's editors as well as one additional reviewer, who is not necessarily an expert in the subject matter of the submission, evaluate submissions. Additionally, all reviewers are aware of the identity of the author at each stage of the process.[76] Processes like these are widely acknowledged to limit the pool of candidates for publication to those individuals and scholars most liked by the editors of the journal.[77] Thus,

---

70. *Id.* at 1314.

71. *Id.* at 1317-18.

72. *See id.* at 1318 ("That the research is accepted for publication in a reputable scientific journal after being subjected to the usual rigors of peer review is a significant indication that it is taken seriously by other scientists, i.e., that it meets at least the minimal criteria of good science.").

73. *See, e.g.*, Richard A. Posner, *Against Law Reviews*, LEGAL AFF., Nov.-Dec. 2004, at 57.

74. *See* Sunstein et al., *Deterrence*, *supra* note 9.

75. Most other professions have academic journals that accept articles for publication only after a "double-blind" review process, in which multiple experts vet research prior to publication. The *New England Journal of Medicine* (NEJM), for example, has at least four medical professionals review submissions prior to publication. These reviewers include the editor-in-chief of the NEJM, an associate editor of the journal with experience in the particular subject matter of the article, and two independent experts in the field. Edward W. Campion, Gregory D. Curfman & Jeffrey M. Drazen, *Tracking the Peer-Review Process*, 343 NEW ENG. J. MED. 1485 (2000).

76. E-mail from Maureen Callahan, Managing Editor, Journal of Legal Studies, to Shireen A. Barday (Apr. 1, 2008) (on file with author).

77. *See* Richard A. Epstein, *Faculty-Edited Law Journals*, 70 CHI.-KENT L. REV. 87,

like the research conducted by plaintiffs' experts in *Daubert*, this Exxon-funded research was neither independently conducted nor verified by other experts in the field. In fact, the only published defenses of the book or the underlying articles have come from the authors themselves.[78]

Of course, unlike many other disciplines, most legal articles are not published in peer-reviewed journals. This fact alone does not render the *Daubert* rule inapposite. Under a broader reading, *Daubert* informs us that "reliable" scholarship is that which is accepted by the field to which the authors belong, as evinced either by peer-reviewed publication (for nonlegal fields) or the presence of multiple articles in the author's field proffering similar viewpoints and methodologies.[79] In the world of traditional legal scholarship, "reliability" is indicated by the prestige of the author and the journal. That practice is itself unreliable when the journal is not qualified to judge the quality of the article. Much of the Exxon-funded scholarship poses a unique problem under this rubric. The authors of this scholarship include social scientists and psychologists whose own fields rely primarily upon peer review, but who can avoid peer review by publishing in law reviews,[80] and thus the reader must be alert to possible methodological issues, even though most readers of law reviews are not trained in social science. This approach is not unique to Exxon and has been adopted by other industry funders, including for example Merck, which funded a focus group study for a law review article written by four doctors addressing the standard of care in medical malpractice cases.[81] It seems likely that corporations such as Exxon seek to fund articles publishable in law reviews to avoid the stricter peer review process of journals in most other

89 (1994) ("If I sense that an author and I will not get along—whether because of differences in temperament or in intellectual orientation—I will not accept an article. . . . The reputation that one acquires, both as an editor and a scholar, exerts a useful sorting effect on the pieces that are submitted for review.").

78. *See, e.g.*, Reid Hastie & W. Kip Viscusi, *Juries, Hindsight, and Punitive Damages Awards: Reply to Richard Lempert*, 51 DEPAUL L. REV. 987 (2002) (responding to Lempert's criticism of Hastie & Viscusi, *supra* note 9, published as Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867 (1999)).

79. *See* Daubert v. Merrell Dow Pharm., 43 F.3d 1311, 1314 (9th Cir. 2005) ("[A]part from the small but determined group of scientists testifying on behalf of the Bendectin plaintiffs in this and many other cases, there doesn't appear to be a single scientist who has concluded that Bendectin causes limb reduction defects.").

80. The full author list of Sunstein et al., *supra* note 3, for example, includes: Daniel Kahneman, Eugene Higgins Professor of Psychology and Professor of Public Affairs, Princeton University, and David Schkade, Professor of Management and William M. Spriegel Fellow, Graduate School of Business, University of Texas, Austin. *Id.* at 2071 nn.††-†††.

81. *See* John W. Ely, Arthur J. Hartz, Paul A. James & Cynda A. Johnson, *Determining the Standard of Care in Medical Malpractice: The Physician's Perspective*, 37 WAKE FOREST L. REV. 861, 861 n.* (2002) ("The focus group for this study was supported by an unrestricted educational grant from Merck Pharmaceuticals."). All four authors are doctors.

disciplines. In addition, publication in a law review means that judges, law clerks, and other practitioners are granted easy access to the article through one or more of the commercial legal databases. Once a publication is listed in one of the two major commercial databases, Westlaw and LexisNexis, it becomes easily accessible to countless legal researchers.

A recent study indicates that affixing a well-known author to a publication enhances the likelihood of the article's selection for publication in peer-reviewed periodicals as well as its acceptance by others in the author's field, even in the face of methodological problems.[82] This reputational effect is especially problematic when compounded by the informational asymmetry of those screening these articles at law reviews. Although law students may be well equipped to evaluate legal doctrinal arguments, they may be less well suited to evaluate claims originating in other disciplines.[83] The fame or popularity of an author may therefore provide a substitute for perfect information about the quality of the methodology or arguments contained within the article.[84] This is especially true in cases where the truth or falsity of the underlying assertions is difficult for a law student to identify because the piece falls beyond the traditional purview of the law review (e.g., the article includes significant empirical research).[85]

---

82. *Cf.* Anna Wilde Mathews, *Ghost Story: At Medical Journals, Writers Paid by Industry Play Big Role*, WALL ST. J., Dec. 13, 2005, at A1 ("The practice of letting ghostwriters hired by communications firms draft journal articles—sometimes with acknowledgment, often without—has served many parties well. Academic scientists can more easily pile up high-profile publications, the main currency of advancement. Journal editors get clearly written articles that look authoritative because of their well-credentialed authors.").

83. *See, e.g.*, Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132 (1995) (arguing that students are not capable of evaluating and editing interdisciplinary articles); *see also* Bernard J. Hibbitts, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267, 292 (1996) ("[T]here's a great deal of legal and non-legal ground about which [student editors] know nothing. . . . they have taken on an evaluative task for which they are simply not prepared.").

84. Natalie C. Cotton, Comment, *The Competence of Students as Editors of Law Reviews: A Response to Judge Posner*, 154 U. PA. L. REV. 951, 960 n.21 (2006) ("Especially because students are not able to weigh the merits of interdisciplinary articles, selection criteria are now made up of political and other inappropriate criteria, such as the reputation of the author, the author's politics or host school, the 'author's commitment to gender-neutral grammatical forms, . . . a desire for equitable representation for minorities and other protected or favored groups, the sheer length of an article, [and] the number and length of the footnotes in it . . . .'" (quoting Posner, *supra* note 83, at 1133-34)).

85. *See* Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1910-11 (2005) (arguing that the publication of a highly controversial antiaffirmative action article in the *Stanford Law Review* was a mistake, requiring scholars to spend time investigating and refuting the article's thesis). Professor Dauber believes that Richard H. Sander's article, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004), would not have been published but for the lax standards of law review article selection.

These constraints are acutely problematic given the role that industry funders play in shaping the content of articles and the subsequent reliance on these articles as objective authority. At one extreme, Merck itself has actually authored scholarly papers for medical journals, shopped them to well-known doctors, and then paid willing doctors thousands of dollars to affiliate with the already-written studies.[86] Exxon has worked with authors to develop outlines, drafts, and appropriate lists of secondary sources for the research it funds.[87]

The very corporation that funded an article and manipulated or at least influenced its content can then cite its own ideas as objective authority in future litigation. When the courts look at industry-funded law review articles without considering the nature of the funding source, they are willfully ignoring the very problem that should have been obviated in part with the *Daubert* standard. Because they are able to provide substantial financial support for authors, corporations such as Exxon are able to, in effect, purchase "evidence" that the courts will then view as objective. The courts might be more wary of such supposedly unbiased authority if they knew the funding source, but the current system lacks any safeguards that might reveal that information. Industry-funded research is problematic because it essentially can be used as evidence not subject to admissibility requirements under *Daubert*, thereby giving Exxon and other corporations a second bite at reducing punitive damages awards against them.

III. TOWARD RESOLVING THE PROBLEM OF INDUSTRY FUNDING

An overarching problem with remunerated research is its use by the legal profession as objective and unbiased evidence. Even when an article has been discredited, the profession continues to rely upon it because there is no easy or systematic way to confirm its validity and/or funding source. There are, however, two steps the legal profession could take to help limit the influence of unconfirmed or flawed research: mandatory disclosure of financial support and a database to track organizations that underwrite research published in law reviews.

Mandatory disclosure will not solve all of the problems with remunerated research, but it would be a first step in the right direction. Currently, law reviews do not require that authors disclose sources of support for their work at all, but they should require submissions be accompanied by a financial disclosure form. Unless authors themselves choose to disclose, or are pressed to do so by their funding sources or employing institutions, it is difficult and laborious for readers to obtain this information. Thus, consumers who rely

86. *See generally* Joseph S. Ross et al., *Guest Authorship and Ghostwriting in Publications Related to Rofecoxib*, 299 JAMA 1800 (2008) (describing Merck's ghost authorship of articles in conjunction with Vioxx litigation).

87. Freudenburg, *supra* note 1, at 19-20.

upon the findings of these articles are likely to have no knowledge that the conclusions may have been tainted by outside influence. Even if an article's conclusions are not tailored to the particular interests of the funding body, the existence of an outside funder with an interest in the subject matter of the article raises a red flag. Failure to disclose this information means depriving readers of facts relevant to the article's accuracy and credibility.

The legal profession has recognized the importance of avoiding conflicts of interest in other contexts. The American Bar Association's Model Rules of Professional Conduct prohibit lawyers from acquiring literary or media rights in a matter until it is entirely completed, from acquiring a proprietary interest in a pending cause of action, and from acquiring a pecuniary interest adverse to a client.[88] Likewise, the Code of Judicial Conduct requires judges to avoid even the appearance of impropriety.[89] Despite the regulations governing conflicts of interest in other areas, the legal profession has not yet come as far as the medical profession in recognizing that the appearance of impropriety alone is a sufficiently compelling justification to decline to publish such work; therefore, the treatment of disclosures of potential conflicts of interest is an important question separate from the reliability of the pieces themselves.

Additionally, other fields have historically recognized a range of problems presented by industry-funded work. Recognizing the real threat of bias in commercially financed articles, medical and other scientific journals have adopted financial-disclosure requirements as a way to screen for conflicts of interest.[90] Some leading publications, including the *New England Journal of Medicine*, have gone so far as to implement a policy against publishing articles by individuals with "any significant financial interest in a company (or its competitor) that makes a product discussed in the article."[91] Such policies exist to prevent bias and also the appearance of bias, both of which are deemed destructive to the integrity of the medical journal.[92]

---

88. MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2004) (adverse pecuniary interest); *Id.* R.1.8(d) (media rights).

89. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2004).

90. Editorial, *Financial Associations of Authors*, 346 NEW ENG. J. MED. 1901, 1901-02 (2002); *see also* E-mail from Karen Pedersen, Manager, Media Relations, New England Journal of Medicine, to Shireen A. Barday (Apr. 2, 2008) (on file with author) ("We assess each author's financial associations on a case-by-case basis, and we exert our best judgment as to what is relevant, or may create bias to a given piece of research. If it is decided that the research warrants publication in our pages, but a conflict of interest exists, that conflict is disclosed in a statement accompanying the article. We do this to inform readers of the existence of financial relationships that, in our judgment, are pertinent to the article, and to affirm that we had access to this information during our deliberations.").

91. Editorial, *supra* note 90, at 1901.

92. Gardiner Harris, *Cigarette Company Paid for Lung Cancer Study*, N.Y. TIMES, Mar. 26, 2008, at A1 ("An increasing number of universities do not accept grants from cigarette makers, and a growing awareness of the influence that companies can have over research outcomes, even when donations are at arm's length, has led nearly all medical journals and associations to demand that researchers accurately disclose financing sources.").

Proposals similar to the policy of the *New England Journal of Medicine* have been debated within the law, but the proposals have been far less comprehensive and have never been binding upon scholars. The Association of American Law Schools, for example, released a "Statement of Good Practices by Law Professors in Discharge of Their Ethical and Professional Responsibilities." Under these standards, law professors who submit writings to a law review for publication are required to "footnote" or otherwise acknowledge any source of outside support that they may have received in the course of their research.[93] The standards specifically provide that "[a] law professor 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."[94] There is, however, no auditing process to determine compliance and no consequence for nondisclosure.

In addition to mandating financial disclosure, judges might benefit from the inclusion of education about remunerated research in the many judicial education programs for new and experienced judges, particularly those programs that already address *Daubert*. Beyond continuing legal education on the subject, the legal profession would be greatly aided by the development of a conflicts-of-interest database that would allow users to query an article or author in order to determine the industry and interest groups from which the author receives funding. Currently, financial disclosures are usually buried in footnotes in the document. A database would provide courts and lawyers with a systematic way to track industry-funded research, which could raise awareness of potentially compromised studies. Presumably, this would lead to increased skepticism of research funded in connection with or in anticipation of litigation, which could help neutralize the impact of biased and aberrant research. As this Note has illustrated, the lack of checks within the legal profession's publication system has enabled interested corporations to buy their way into favorable articles that they can later cite to support their litigation positions. Once these sources are cited in a party's brief, a judge may well cite the same source in his or her opinion. If, for example, disclosure requirements were imposed at all levels of the legal system, perhaps the Supreme Court Justices who cited Exxon-funded research would have thought twice about relying on supposedly objective sources.

93. *See* STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES pt. II (2003), http://www.aals.org/about_handbook_sgp_eth.php.

94. *Id.*

CONCLUSION

The fact that authors who receive industry funding tend to draw conclusions in line with the institutional positions of their underwriters is not surprising. Though many such pieces will demonstrate bias, the fact of corporate underwriting does not necessarily indicate that the research has been compromised. As one author wrote, "If the devil advocates that two plus two is four, it is not automatic that two plus two is not four."[95] Industry funding does, however, create at least an appearance of impropriety that calls into question the integrity of the research/scholarship. The legal profession has thus far ignored conflicts of interest when it comes to publishing. Law reviews freely publish sponsored work without examining the author's financial interests; parties to litigation present sponsored work to the judiciary in the form of objective authority as referenced in briefs; and judges cite the work without any acknowledgement that a party or other interested source funded the author's research. In other scholarly fields, conflicts of interest are treated very carefully, and any financial relationship that may create bias in a given piece of research is scrutinized before an offer for publication is even extended. Because the legal profession has no similar safeguard, unquestioning reliance upon funded articles can be a risky proposition. In such a high-stakes arena as the punitive damages issue, the validity of underlying sources is paramount for ensuring the integrity of the judicial system.

95. Daniel Koshland, Jr., Editorial, *Conflict of Interest Policy*, SCI., July 31, 1992, at 595, 595.

APPENDIX A: AUTHOR, TITLE, FUNDERS, CASES CITING TO THE ARTICLE, AND MAJOR HOLDING OF THE CASE RELATING TO PUNITIVE DAMAGES

Author	Title	Funder	Cited In	Case Holding
John Y. Gotanda	*Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton, Inc.	Villanova University School of Law	*In re* Cudd Pressure Control, Inc. No. Civ. A. 98-585, 1999 WL 820551 (E.D. La. Oct. 13, 1999)	Denial of punitive damages request
Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin T. Wells	*The Predictability of Punitive Damages*	Bureau of Justice Statistics	State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999)	Legislative enactment violated one-subject rule of State Constitution
Alan Calnan	*Ending the Punitive Damage Debate*	Southwestern University School of Law	Farmland Mutual Insurance Co. v. Johnson, 36 S.W.3d 368 (Ky. 2001)	$2 million punitive damages judgment not excessive
Stephen J. Ware	*Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*	Cumberland School of Law, Samford University	Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995)	Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995)

Stephen Landsman, Shari Diamond, Linda Dimitropoulos & Michael J. Saks	*Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*	G.D. Searle & Co.	Prudential Insurance Co. of America v. Stewart, 969 So. 2d 17 (Miss. 2007) (Graves, J., dissenting)	Reversing $35 million punitive damages award
			Diodato v. Rogers, 728 A.2d 882 (N.J. Super. Ct. Law Div. 1998)	Bifurcation of issues of liability and damages warranted new trial with combination of issues
N/A	*An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*	John M. Olin Foundation	TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003)	Granting remititur against $108 million punitive damages award
			Anderson v. State *ex rel.* Central Bering Sea Fishermen's Ass'n, 78 P.3d 710 (Alaska 2003)	Employee of nonprofit economic development corporation did not have "property interest" in whole punitive damages judgment

Author	Title	Funder	Cited In	Case Holding
Cass R. Sunstein, Daniel Kahneman & David Schkade	*Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*	Exxon Corporation	Lane v. Hughes Aircraft Co., 993 P.2d 388 (Cal. 2000)	Court of Appeal committed reversible error by applying same standard of review to new trial motion as it did to grant of JNOV
			Cooper Industries v. Leatherman Tool Group, 532 U.S. 424 (2001)	Jury assessment of punitive damages not a question of fact; therefore, Court of Appeals should apply de novo standard in determining the constitutionality of a punitive damages award
			Calhoun v. Yamaha Motor Corp., U.S.A., 216 F.3d 338 (3d Cir. 2000)	Holding that punitive damages should be assessed under Puerto Rican law
			United States v. Rogan, 517 F.3d 449 (7th Cir. 2008)	Question of whether damage assessment violated Eighth Amendment's Excessive Fines Clause could not be addressed on appeal

Granting remittitur against $108 million punitive damages award	TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 418 (S.D.N.Y. 2003)			
Certification of class under limited punishment theory was appropriate	*In re* Simon II Litigation, 211 F.R.D. 86 (E.D.N.Y. 2002)			
Appropriate standard of review of trial court's decision not to award punitive damages was abuse of discretion rather than whether decision was against "manifest weight of the evidence"	Franz v. Calaco Development Corp., 818 N.E.2d 357 (Ill. App. Ct. 2004)			

Author	Title	Funder	Cited In	Case Holding
A. Mitchell Polinsky & Steven Shavell	*Punitive Damages: An Economic Analysis*	Exxon Corporation	Lane v. Hughes Aircraft Co., 993 P.2d 388 (Cal. 2000)	Court of Appeal committed reversible error by applying same standard of review to new trial motion as it did to grant of JNOV
			Cooper Industries v. Leatherman Tool Group, 532 U.S. 424 (2001)	Jury assessment of punitive damages not a question of fact; therefore, Court of Appeals should apply de novo standard in determining the constitutionality of a punitive damages award
			Restrepo v. McElroy, 369 F.3d 627 (2d Cir. 2004)	Vacating and remanding grant of habeas petition
			United States v. Rogan, 517 F.3d 449 (7th Cir. 2008)	Question of whether damage assessment violated Eighth Amendment's Excessive Fines Clause could not be addressed on appeal

Parks v. Wells Fargo Home Mortgage, Inc., 398 F.3d 937 (7th Cir. 2005)	Vacating and reversing punitive damages award			
Conder v. Union Planters Bank, N.A., 384 F.3d 397 (7th Cir. 2004)	Affirming dismissal of suit			
Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617 (7th Cir. 2000)	Reversing award of punitive damages and remanding			
TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003)	Granting remittitur against $108 million punitive damages award			
In re Simon II Litigation, 211 F.R.D. 86 (E.D.N.Y. 2002)	Certification of class under limited punishment theory was appropriate			

Author	Title	Funder	Cited In	Case Holding
A. Mitchell Polinsky & Steven Shavell	*Punitive Damages: An Economic Analysis*	Exxon Corporation	Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 133 F. Supp. 2d 162 (E.D.N.Y. 2001)	Insurer subrogated as to subscribers' rights to punitive damages
			Norcon, Inc. v. Kotowski, 971 P.2d 158 (Alaska 1999)	Finding the award of punitive damages was excessive, but finding that a substantial award is justified.
			Clark v. Cantrell, 504 S.E.2d 605 (S.C. Ct. App. 1998)	Affirming award of punitive damages
			Sipple v. Starr, 520 S.E.2d 884 (W. Va. 1999)	Reversing grant of summary judgment for defendant and remanding

APPENDIX B: AUTHOR, TITLE, FUNDER, CASES CITING TO ARTICLE, AND QUOTATIONS FROM CASES REFERENCING ARTICLE

Author	Title	Funder	Cited In	Quotation
John Y. Gotanda	*Awarding Punitive Damages in International Commercial Arbitrations in the Wake of* Mastrobuono v. Shearson Lehman Hutton, Inc.	Villanova University School of Law	*In re* Cudd Pressure Control, Inc. No. Civ. A. 98-585, 1999 WL 820551 (E.D. La. Oct. 13, 1999)	"In the absence of any authority being brought to the attention of the Court as proof of the availability of punitive damages under Venezuelan law, the Court must resort to the invocation of general civilian principles, which traditionally have not allowed punitive damages, but which focus instead on making the plaintiff whole. *See* [*Gotanda*]."
Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin T. Wells	*The Predictability of Punitive Damages*	Bureau of Justice Statistics	State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999)	"In its most elementary form, this conflict reflects a power struggle between those who seek to limit their liability and financial exposure for civil wrongs and those who seek compensation for their injuries. Research indicates that there is a vast amount of scholarly analysis available on either side of virtually every conceivable aspect of this debate. [*See, e.g.*, *Eisenberg* et al.]."
Alan Calnan	*Ending the Punitive Damage Debate*	Southwestern University School of Law	Farmland Mutual Insurance Co. v. Johnson, 36 S.W.3d 368 (Ky. 2001)	"Even the Bible suggests the use of punitive damages in some instances, as in this passage from Exodus: '[I]f a man shall steal an ox or a sheep, and kill it or sell it, he shall restore five oxen for an ox, four sheep for a sheep.' The problem with relying on this ancient basis to reaffirm the inherent correctness of punitive damages is that these civilizations made no attempt to distinguish civil from criminal law. [*Calnan*]."

Author	Title	Funder	Cited In	Quotation
Stephen J. Ware	*Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*	Cumberland School of Law, Samford University	Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995)	"The expertise of arbitrators and the lack of bias in the arbitral forum have caused some commentators to predict that 'runaway punitive damage verdicts are a problem that is likely to be reduced, rather than aggravated, by shifting disputes from courts to arbitration.'" [*Ware*].
Stephen Landsman, Shari Diamond, Linda Dimitropoulos & Michael J. Saks	*Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*	G.D. Searle & Co.	Prudential Insurance Co. of America v. Stewart, 969 So. 2d 17 (Miss. 2007) (Graves, J., dissenting)	"Mandatory bifurcation is an unwise and inefficient use of judicial resources and of jurors' time. *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633, 659 (Ct.App.1992) (holding that mandatory bifurcation would result in the 'same witness having to repeat their testimony, . . . this duplication would burden both witnesses and jurors as well as waste judicial resources.'). *See also*, [*Landsman et al.*] (finding that the 'incidence of punitive liability increases . . . [and] the size of the award also increases substantially if the case is bifurcated')."
			Diodato v. Rogers, 728 A.2d 882 (N.J. Super. Ct. Law Div. 1998)	"Despite its efficiencies, bifurcation can segment issues traditionally heard as a unit. *See* [*Landsman* et al.]. It can also limit the jury's role by restricting the trial to narrow issues, without allowing the jury to consider the underlying policy or law or to ameliorate the harshness of rules. *See ibid.*"

N/A	*An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*	John M. Olin Foundation	TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003)	"While one side of the excessive verdict coin portrays the undue burdens defendants may bear, the reverse side expresses concern over potential unjust enrichment of plaintiffs by windfalls that exemplary damages may bestow, particularly to litigants who may enjoy the good fortune of being first to file in court, *see, e.g.*, *Roginsky*, 378 F.2d at 839-40, or of potentially recovering from a deep pocket or fully indemnified defendant, *see, e.g.*, *Haslip*, 499 U.S. at 22; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71, 69 L.Ed.2d 616, 101 S.Ct. 2748 (1981); *see also Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992); *Aldrich v. Thomson McKinnon Sec*, 756 F.2d 243, 249 (2d Cir. 1985); *see generally* [*Windfall*]."	"A Harvard Law Review note in 1992 suggested a solution for obtaining the optimal level of liability on the defendant consistent with the goals of deterrence or retribution while providing the plaintiff with no more than full compensation . . . . The difference between the defendant's total liability and the plaintiff's award would go to a general fund used to reduce taxes. [*Windfall*]."
			Anderson v. State *ex rel.* Central Bering Sea Fishermen's Ass'n, 78 P.3d 710 (Alaska 2003)		

Author	Title	Funder	Cited In	Quotation
Cass R. Sunstein, Daniel Kahneman & David Schkade	*Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*	Exxon Corporation	Lane v. Hughes Aircraft Co., 993 P.2d 388 (Cal. 2000)	"Why does the concurring opinion propose to judicially reform punitive damages? The principal reason given is that such damages are awarded by juries in an arbitrary fashion. But it concedes that the very commentators who criticize punitive damages for their arbitrariness have also criticized reforms like that proposed by the concurring opinion as being at odds with punitive damages' central purpose of deterring wrongful conduct. *See* [*Sunstein et al.*] ('no theory of punitive damages justifies a [compensatory damages] multiplier approach')." [And discussed throughout].
			Cooper Industries v. Leatherman Tool Group, 532 U.S. 424 (2001)	"A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation. . . *See also* [*Sunstein et al.*] ('[P]unitive damages may have a retributive or expressive function, designed to embody social outrage at the action of serious wrongdoers')."
			Calhoun v. Yamaha Motor Corp., U.S.A., 216 F.3d 338 (3d Cir. 2000)	"*Punitive* damages, on the other hand, are intended to punish wrongdoers and deter future conduct. *See, e.g.*, *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800, 803 (1989); [*Sunstein et al.*] (quoting a jury instruction regarding punitive damages as stating 'the purpose of such an award is to punish the wrongdoer and to deter that wrongdoer from repeating such wrongful acts')."

		TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003)	"The questions yet unsettled in this dispute continue to vex litigants, courts, legislators and members of the general public, and thus present formidable challenges to our legal system. *See generally* [*Sunstein et al.*]."
		In re Simon II Litigation, 211 F.R.D. 86 (E.D.N.Y. 2002)	"There is literature suggesting that punitive damage awards work best when they accompany compensatory damage judgments, which may provide a jury with a useful gauge of how much of an award is appropriate. *Cf.* [*Sunstein et al.*] (suggesting that juries best determine punitive damages when they have a compensatory 'anchor' to assist them)."
		Franz v. Calaco Development Corp., 818 N.E.2d 357 (Ill. App. Ct. 2004)	"Determination of damages is typically a question of fact for the jury. *Snover v. McGraw*, 172 Ill.2d 438, 447, 217 Ill.Dec. 734, 667 N.E.2d 1310 (1996); see also *Cooper Industries Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 446-47, 121 S.Ct. 1678, 1691, 149 L.Ed.2d 674, 693-94 (2001) (Ginsburg, J., dissenting) (arguing that assessment of punitive damages is no less a finding of fact than assessment of pain and suffering damages); [*Sunstein et al.*] (likening punitive damages to pain and suffering damages in that both defy precise calculation). Thus, it is tempting to state that an assessment of punitive damages is a finding of fact."

Author	Title	Funder	Cited In	Quotation
A. Mitchell Polinsky & Steven Shavell	*Punitive Damages: An Economic Analysis*	Exxon Corporation	Lane v. Hughes Aircraft Co., 993 P.2d 388 (Cal. 2000)	"Commentators have criticized reforms of the kind suggested here, of course. The chief criticism is that, though some sort of calibration of awards is necessary to ensure fairness to defendants, use of compensatory damages as the calibrating factor is arbitrary. (See, e.g., *Assessing Punitives*, *supra*, 107 Yale L.J. at p. 2127; [*Polinsky & Shavell*]).*"* [Discussed throughout]
			Cooper Industries v. Leatherman Tool Group, 532 U.S. 424 (2001)	"Some scholars, for example, assert that punitive damages should be used to compensate for the underdeterrence of unlawful behavior that will result from a defendant's evasion of liability. See [*Polinsky & Shavell*] (in order to obtain optimal deterrence, 'punitive damages should equal the harm multiplied by . . . the ratio of the injurer's chance of escaping liability to his chance of being found liable')."
			Restrepo v. McElroy, 369 F.3d 627 (2d Cir. 2004)	"In this sense, deportation, like some other kinds of civil sanctions, combines an unmistakable punitive aspect with non-punitive aspects. *See, e.g.*, . . . *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 438-39, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) (observing that punitive damages may serve punitive purposes as well as non-punitive purposes, such as deterrence) (citing, *inter alia*, [*Polinsky & Shavell*] . . . ."

United States v. Rogan, 517 F.3d 449 (7th Cir. 2008)	"The lower the rate of a fraud's detection, the higher the multiplier required to ensure that crime does not pay. See [*Polinsky & Shavell*]."			
Parks v. Wells Fargo Home Mortgage, Inc., 398 F.3d 937 (7th Cir. 2005)	"One of the purposes of punitive damages is to punish a defendant who might otherwise find that its behavior was cost-effective. See [*Polinsky & Shavell*] ('[I]f a defendant can sometimes escape liability for the harm for which he is responsible, the proper magnitude of damages is the harm the defendant has caused, multiplied by a factor reflecting the probability of his escaping liability.')"			
Conder v. Union Planters Bank, N.A., 384 F.3d 397 (7th Cir. 2004)	"Imposing liability on someone who hasn't actually caused a harm (because the harm would have occurred anyway) creates incentives to take excessive, and therefore socially wasteful, precautions, *Movitz v. First Nat'l Bank of Chicago*, 148 F.3d 760, 762-63 (7th Cir.1998); [*Polinsky & Shavell*], with the effect of impeding commerce."			
Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617 (7th Cir. 2000)	"Frauds often escape detection, and the need to augment deterrence of concealable offenses is a principal justification of punitive damages. See [*Polinsky & Shavell*]; Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 Mich. L. Rev. 2185 (1999)."			

Author	Title	Funder	Cited In	Quotation
A. Mitchell Polinsky & Steven Shavell	*Punitive Damages: An Economic Analysis*	Exxon Corporation	TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413 (S.D.N.Y. 2003)	"The questions yet unsettled in this dispute continue to vex litigants, courts, legislators and members of the general public, and thus present formidable challenges to our legal system. [*See generally* [*Polinsky & Shavell*].]"
			In re Simon II Litigation, 211 F.R.D. 86 (E.D.N.Y. 2002)	"An important, but sometimes ignored, purpose of punitive damages is to provide a kind of disgorgement where many individual compensatory claims cannot be brought; the total harm of tortious acts is then paid as an external cost of the operations of a tortfeasor. *See, e.g.*, David Luban, *A Flawed Case Against Punitive Damages*, 87 Geo. L.J. 359, 366 (1998) ('One way to enforce environmental and safety law is through centralized public agencies-the regulators and the police. A second way is through private causes of action brought by private parties.'); [*Polinsky & Shavell*] ('[P]unitive damages ordinarily should be awarded, if, and only if, an injurer has a chance of escaping liability for the harm he causes')."

		Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 133 F. Supp. 2d 162 (E.D.N.Y. 2001)	"Indeed, such self-interest of the plaintiff has been characterized as perhaps the principal advantage of sanctioning punitive damages, where the same motive would often lead him to refrain from the trouble incident to appearing against the wrongdoer in criminal proceedings. 10 N.Y.2d at 404; *see also, e.g.*, David Luban, *A Flawed Case Against Punitive Damages*, 87 Geo. L.J. 359, 366 (1998) ("One way to enforce environmental and safety law is through centralized public agencies-the regulators and the police. A second way is through private causes of action brought by private parties."); [*Polinsky & Shavell*] ('[P]unitive damages ordinarily should be awarded, if, and only if, an injurer has a chance of escaping liability for the harm he causes')."
		Norcon, Inc. v. Kotowski, 971 P.2d 158 (Alaska 1999)	"In my view, an award no larger than $500,000 should be ample to remove all profit derived by tolerating such practices and to punish Norcon. Any larger award is therefore both unnecessary and inefficient. [*See* [*Polinsky & Shavell*]]."
		Clark v. Cantrell, 504 S.E.2d 605 (S.C. Ct. App. 1998)	"Although punitive damages have received increasing academic criticism in recent years [*see generally* [*Polinsky & Shavell*] (debating efficiency of punitive damages and suggesting economic methods for achieving goals of punishment and deterrence)], the doctrine's viability is unchallenged in South Carolina's jurisprudence."

Author	Title	Funder	Cited In	Quotation
A. Mitchell Polinsky & Steven Shavell	*Punitive Damages: An Economic Analysis*	Exxon Corporation	Sipple v. Starr, 520 S.E.2d 884 (W. Va. 1999)	"Scholars have recognized the social harm threatened by such an arrangement. The externalization of risk to potentially judgment-proof contractors has an important implication. These contractors will tend to conduct their activities with less care than will actors with more at stake.... Therefore, the frequency of accidents will increase as a result of the externalization of risk. [*Polinsky & Shavell*] (footnote omitted)."